conclusions of law. After reviewing the record and considering the parties' arguments, the Court grants in part and denies in part the application for a Writ of Habeas Corpus.

I. BACKGROUND

The crime occurred in the early morning hours of January 6, 1987. The evidence supporting the verdicts was summarized by the Missouri Supreme Court as follows:

> Defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.
>
> The purpose of defendant's visit was to obtain "crack" cocaine. Wright had previously promised to get the cocaine and sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.
>
> According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut

> Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner, and Ford as their attackers.

State v. White, 813 S.W.2d 862, 863-64 (Mo. 1991) (en banc), cert. denied, 502 U.S. 1103 (1992) ("White I").

The primary evidence against Petitioner at trial was the testimony of Kinney and Black – the surviving victims of the attack. Early in her direct examination, Kinney testified that Petitioner was one of the three individuals who came to the house she shared with Wright, and that the other individuals were Roger Buckner and a man with the last name of "Ford." T.Tr. at 593.[2] She testified that she had been using crack cocaine daily for the past six months, T.Tr. at 595, and that she had been smoking crack the night of January 5 and the morning of January 6. T.Tr. at 596. She explained that she arrived at the house her brother (Ben Kinney, hereinafter "Ben") shared with his girlfriend and his girlfriend's mother at approximately 7:00 p.m. on the night of the fifth and, along with five or six other people, smoked crack. T.Tr. at 598-99, 601. Wright, Black, and Black's girlfriend were among the other people present. T.Tr. at 601-02.[3] At approximately midnight, Black drove Wright and Kinney, along with Kinney's sons, Black's girlfriend and Black's brother (Earl) to the house Wright and Kinney shared. T.Tr. at 603. She put her kids to bed, whereupon the adults resumed smoking crack. T.Tr. at 604. At Kinney's request, Black and Wright returned to her brother's

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[2]"T.Tr. at ____" is a reference to the trial transcript.

[3]Kinney's sons, Deonta and Raymond (ages eight and seven, respectively) were also there, but were in another room and not taking drugs. T.Tr. at 601.

house to try to get some money, but the effort failed. Later, Black and Wright took Black's girlfriend and Earl home, and later still returned to Ben's house to try to get some money. Approximately forty-five minutes after they came back from this latest trip somebody knocked at the back door by the kitchen. T.Tr. at 606-07. Kinney answered the door and encountered two men she did not know who were looking for Wright. T.Tr. at 608. While answering the door, she observed a blue van parked outside the house. T.Tr. at 632. Earlier, Wright had indicated he was expecting some visitors, and he admitted the men into the house. T.Tr. at 609. Kinney testified Petitioner was one of the two men to enter the house, T.Tr. at 610, and she noticed that he had a solid gold tooth on the right side of his mouth. T.Tr. at 612-13. She also indicated that Buckner looked familiar and thought he knew her brother. T.Tr. at 663-64.

The visitors and Wright began discussing a drug transaction. T.Tr. at 610. At some point during the conversation someone slammed open the back door and entered the house. T.Tr. at 614. Kinney recognized this third visitor as someone she had seen at a club several years ago but did not recall his name at that time. He told Kinney he was with Petitioner and Buckner. T.Tr. at 615. As Kinney returned to the front room and sat on the couch, Petitioner and Buckner drew their guns and Petitioner asked Wright "where the dope was." T.Tr. at 616. After Wright denied having any drugs, Petitioner began hitting him on the head with the gun and kicking him, and kept demanding to know where the drugs and money were. T.Tr. at 617-19. Eventually, Petitioner and Buckner began beating Black as well. T.Tr. at 620.

At one point, Petitioner told Buckner to get something with which to tie up Wright, and Buckner located an extension cord. They tied Wright's knees and hands together and continued questioning him. When Wright continued to deny having any

answers for his attackers. Petitioner took an extension cord and wrapped it around Wright's neck, choking him. T.Tr. at 621-22. When this failed to kill Wright, Buckner made Kinney get on the floor and used her belt
and some tape to tie her hands and legs. T.Tr. at 623. Petitioner declared that "[a]ll three of them die." T.Tr. at 624.

Buckner went into the kitchen and returned with a kitchen knife. Kinney saw Ford grab Wright's head and hold it back while Petitioner cut Wright's throat. T.Tr. at 626-27. Buckner then made Kinney go into a bedroom. After some debate, he then took the knife from Petitioner and cut Kinney's throat from behind. T.Tr. at 630.[4] The men left soon thereafter.

Kinney's sons contacted the police, and she was taken to the hospital for surgery. She subsequently spoke to the police and was shown five photographs and identified State's Exhibit 102 as a photograph of the man who cut her neck; the picture was of Roger Buckner. T.Tr. at 637-38. In March 1987, the police showed her some additional photographs and she identified State's Exhibit 112 as a photo of the third man who had come to her house (Ford). T.Tr. at 639. The following day, she picked Ford out of a lineup. T.Tr. at 641-43. Finally, in May 1997 she viewed a videotaped lineup (State's Exhibit 132) and identified Petitioner as one of the men at her house. T.Tr. at 644-45. She did not recall whether the police ever showed her photographs at any other time while she was in the hospital, nor did she recall how many other occasions the police came to the hospital to talk to her, but she did recall giving a videotaped statement at the police station. T.Tr. at 638. On cross-examination, she also disavowed any memory of identifying another individual who was never charged. T.Tr. at 650. There is no evidence that Petitioner's photograph was ever

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[4]Kinney was in a bedroom, so she didn't know who cut Black. Black had passed out before being cut, so he didn't know who cut him. T.Tr. at 874.

shown to Kinney prior to her picking him out of the videotaped lineup. Finally, prior to concluding her direct testimony, Kinney was shown three other photographs, one of which (State's Exhibit 121) was a photograph of Christopher (A.J.) Constantine; Kinney testified that none of the people in those three photographs were at her house that night. T.Tr. at 645-46.[5]

On cross-examination, Kinney was asked about her descriptions of the men. She testified that she told detectives Petitioner was "a black male in his late 20's, five-nine to five-ten, about 170 pounds" and that none of the thee men spoke with a Jamaican accent. T.Tr. at 658. She did not recall telling them that Petitioner had a gold tooth. T.Tr. at 658-59. Upon further questioning about the additional photos (including Constantine's), Kinney admitted that she knew Constantine to be a drug dealer and that she knew of someone named "A.J." but denied knowing him personally. T.Tr. at 679-80. She also denied telling either her brother or Black that Constantine was one of the men at her house. T.Tr. at 680-81. Petitioner's trial attorney also asked questions demonstrating Kinney's prior drug use. T.Tr. at 669-75.

Black also testified about his prior use of crack cocaine. T.Tr. at 841-42. His testimony about the events of the evening and early morning surrounding the attack substantially mirrors Kinney's testimony. He confirmed Kinney's testimony about a blue van outside her house. T.Tr. at 861-62. He knew Buckner and in fact had seen him earlier that evening when he and Wright had returned to Kinney's brother's house the first time. T.Tr. at 853. Buckner indicated he was looking for some crack and Wright indicated he could get him some and told him

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[5]The Index of Exhibits appearing at the front of the Trial Transcript (specifically, page XII) identifies State's Exhibit 121 as a "Photo of A.J. Christopher Constantine." See also T.Tr. at 897 (Petitioner's counsel describing State's Exhibit 121 as a picture of Constantine).

to come over to his house later. T.Tr. at 855-56. He recognized Buckner as the first person to enter Kinney's house but had never seen the second man before. He described the second man as "probably about five-nine, five-ten, probably about 160, and he had a beard, a full beard, and moustache and dark – well, not real dark skin. He was dark skinned." T.Tr. at 863. Unlike Kinney, he testified that the second man wore a green, red and white stocking cap. Compare T.Tr. at 661 with T.Tr. at 863. Upon viewing Petitioner at trial, Black testified that he looked like "the man that came in with [Roger] Buckner." T.Tr. at 890.

On cross-examination, Black denied knowing anyone by the name of A.J. Constantine or Christopher Constantine. T.Tr. at 895. Upon being shown State's Exhibit 121 (Constantine's picture), Black conceded that he had "some of the same characteristics" as the second man. T.Tr. at 896. He denied previously telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine as the second man. T.Tr. at 924, 932. Black was never explicitly asked if Constantine was the second man, but he insisted that Petitioner was the second man. T.Tr. at 953-56. He also denied that the second man spoke with an accent. T.Tr. at 938-39, 955.

Other witnesses linked Petitioner to Buckner, Ford and the crime; still other witnesses confirmed Kinney's and/or Black's identifications and rebutted defense counsel's attempt to cast doubt on the validity or consistency of those identifications. Officer Mark Hatcher arrested Buckner (pursuant to an arrest warrant) on April 11, 1987. Buckner was found hiding in a closet in his girlfriend's apartment. A search of the premises uncovered a wallet containing Petitioner's driver's license and social security card. T.Tr. at 713. Officer Carl Kegler confirmed that when Kinney saw the lineup with Petitioner in it she "immediately recognized him as one of the assailants that had been in the house that night she was stabbed and Mr. Wright was killed. . . ." T.Tr. at 720. Detective John Peterson

testified that he examined Petitioner for distinguishing characteristics shortly following his arrest and that at that time Petitioner had "one solid gold tooth and two open-faced tooths and one of them had three diamonds in it." T.Tr. at 729.

Detective Edward Glynn testified that on January 12, 1987, he went to the construction site where Buckner worked in an attempt to find Buckner when he picked up his paycheck. T.Tr. at 740-41. By the time he arrived, Buckner's check had been picked up by someone in a black Cadillac. The Cadillac's trek away from the site was observed by a police helicopter unit, and Detective Glynn was thus directed to a residence in Independence, Missouri. Upon arriving, he found the black Cadillac parked outside. Petitioner was inside the residence. T.Tr. at 741-43. Petitioner voluntarily went to the police station with Detective Glynn, where he was briefly interviewed (by someone other than Detective Glynn) and photographed (by Detective Glynn). T.Tr. at 742-43.[6] Detective Glynn explained that Petitioner was not a suspect at that time, but was asked to go downtown because it appeared that he had picked up Buckner's check and it was unknown what part, if any, he played in the murders. T.Tr. at 745, 747.

Detective Clarence Gibson visited Kinney at the hospital the day of and the day after the attacks. She identified Buckner out of a photo array but failed to pick Constantine's picture out of a different array. T.Tr. at 752-54. Detective Gibson also testified that he interviewed Petitioner when Detective Glynn brought him to the station. Petitioner told him he had loaned the Cadillac to an acquaintance named Larry Thomas (whose address he did not know) for the purpose of picking up

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[6]Detective Glynn had no knowledge as to whether Petitioner's photograph was shown to Kinney when she was interviewed the next day. T.Tr. at 747. Other witnesses denied that this occurred, and nobody testified to the contrary. The photograph taken by Detective Glynn was State's Exhibit 117. T.Tr. at 750.

Buckner's check. Petitioner admitted knowing who Buckner was and that Buckner was "on the run" but denied knowing where he was hiding. T.Tr. at 755-56.

Detective Gibson confirmed that he talked to Kinney after he interviewed Petitioner, and she told him the man who entered with Buckner had a gold tooth. T.Tr. at 757.[7] He testified that he showed Kinney another photo array on January 18, 1987 that did not include a picture of either Buckner, White or Ford, and Kinney failed to positively identify anyone in that array. T.Tr. at 758. He showed her an array on March 15, 1987, and she identified anyone Ford as the third man. Up to this point in time, Detective Gibson had not shown Kinney Petitioner's picture, T.Tr. at 757, 759, 782-83 -- in fact, up to this point in time he did not even know that the police *had* Petitioner's picture. T.Tr. at 771-72.

One of Buckner's co-workers (Earl Wells) testified that he lived across the street from Buckner, regularly rode to work with him, and often saw Petitioner at Buckner's house. T.Tr. at 958-60, 965. Buckner owned a white Plymouth or Pontiac, but the last time they rode together Buckner drove a black Cadillac that he had seen Petitioner driving in the past. T.Tr. at 960-61. On the night of January 5,[8] he saw Petitioner drive Buckner's white car to Buckner's house and knock on the door. T.Tr. at 968-70. Eventually, Petitioner got back in Buckner's car and drove off; Buckner went back into his house. T.Tr. at 970. Later, Buckner drove off in the black Cadillac. T.Tr. at 971.

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[7]Kinney's statement was videotaped. T.Tr. at 757.

[8]Although Wells could not testify as to the precise date, the date can be deduced based on Wells' other testimony from James Brown (Wells' and Buckner's employer) and Officer Carl Kegler (who went to the construction site and talked to Wells).

Detective Lee Floyd testified that he interviewed Kinney's sons. He showed Raymond (the younger child) a photo array that included pictures of Buckner and Constantine, but the boy did not identify anyone in the array. T.Tr. at 988-89. Deonta viewed the same array and indicated that he recognized Constantine, although Detective Floyd testified that Deonta did not actually identify Constantine as being there that night. T.Tr. at 989-90.

Raymond was one of Petitioner's two witnesses in the guilt phase; at the time he was ten years old. He testified that one of the men that visited his house that night "talk[ed] funny." When asked what kind of voice he understood that to be, Raymond said it was a "Jamaican accent." T.Tr. at 999. He also testified that he had a chance to see that man's face, and Petitioner was not the man who spoke with a Jamaican accent. T.Tr. at 999-1000. However, when a series of photographs (including State's Exhibit 121, Constantine's photo), Raymond denied that any of them looked familiar. T.Tr. at 1000-01. Deonta did not testify.

II. DISCUSSION

The Court will address all of the issues Petitioner has raised, regardless of whether or how they have been previously rejected. This will insure that the disposition of all of Petitioner's claims is documented in one place and avoid confusion about the basis for the Court's rulings on the various issues.

A. Ineffective Assistance of Trial Counsel: Voir Dire, Part I

This claim attacked the manner in which counsel conducted voir dire. The Court previously denied relief on this claim, and the Eighth Circuit affirmed in the second appeal. White v.

Luebbers, 307 F.3d 722, 727-29 (8th Cir. 2002), cert. denied, 538 U.S. 981 (2004).

B. Informing Jurors About the Governor's Power to Pardon

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, White v. Bowersox, 206 F.3d 776, 783 (8th Cir.), cert. denied, 531 U.S. 917 (2000), and the Eighth Circuit's second opinion does not require reconsideration of those claims. Accordingly, this claim is rejected.

C. Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection

This argument alleges that counsel was ineffective for failing to raise the objection discussed in the preceding section. This claims was rejected on the merits in the Court's first order, wherein the Court observed that the objection in question was not meritorious so counsel could not be ineffective for failing to assert it. This is merit-based determination that the Eighth Circuit did not require to be re-examined.

D. Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror Ruth Tuggle

The claim was previously denied on the merits, and the Eighth Circuit affirmed. White v. Luebbers, 307 F.3d at 729-30.

E. Denial of Right to Fair and Impartial Jury

This claim alleged that Petitioner's right to a fair and impartial jury was denied because Juror Tuggle was not removed. This claim was denied on the merits, and the Eighth Circuit's discussion of the preceding issue affirms this Court's ruling.

F. Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause

This claim was previously denied on the merits, and the Eighth Circuit affirmed in the first appeal. White v. Bowersox, 206 F.3d at 782.

G. Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror

During the small-group voir dire, Venirewoman Brison (who was number 33 on the panel) discussed her concerns and hesitations about voting in favor of the death penalty. T.Tr. at 276-77, 284. The prosecutor's motion to strike her for cause was denied. T.Tr. at 298-91. Petitioner contends that the prosecutor "slipped" her onto a list of jurors who had been removed for cause, and counsel's failure to remedy this error constituted ineffective assistance of counsel. In its two previous Orders, the Court denied this claim because it was procedurally defaulted and on the merits. Arguably, the discussion of the merits was dicta, so in an abundance of caution the Court will set forth its ruling on this issue.

The relevant portion of the transcript reflects the following discussion:

Prosecutor #1: Judge, we have enough, if we want to save a bunch of time, I think both parties would agree we could excuse – I think there were eleven, is that right?

Prosecutor #2: Eleven people on sequestration.

Prosecutor #1: That should take us down to 40 [venirepersons].

The Court: Well, if we're going to do that by agreement, I have no objection to that. So if I have the right list, that's [venirepersons] 23, 25, 27, 20, 46, 33, 69, 45, 73, 90 and 92.

Prosecutor #1: That's what our numbers show.

Prosecutor #2: I think it's 42, Judge.

The Court: That's what I started to question. That looks more like a 4 than it does a 9. Yes. Carder. I had the name down. 42. Well, I'm not going to do that unless it's by agreement.

Defense Counsel: I'm just checking, Judge. I'll agree to it.

The Court: Do you understand, Mr. White?

Defendant: [nods head]

The Court: You have no objection to it?

Defendant: No, sir.

T.Tr. at 493-94. This discussion demonstrates that this list was not offered as a list of potential jurors that had been struck for cause; it was a list of jurors the two sides mutually agreed could be struck because of their answers regarding sequestration. The Court made clear that absent the agreement, these jurors would not be struck. (Interestingly, the fact that Defendant's trial

counsel made the agreement was itself offered as a ground for relief in the Second Amended 29.15 Motion. See L.F. at 28.).[9] *Nobody* on this list was struck for cause. See T.Tr. at 245-50, 273-74, 291-92, 307, 321, 340-41, 365, 384, 389, 401, 413-14, 434, 444 (portions of transcript referencing jurors who were stuck for cause).

H. Ineffective Assistance of Trial Counsel: Voir Dire, Part II

This argument is closely related to the one addressed in Section II(A), and as noted in that discussion it was affirmed in the second appeal.

I. Ineffective Assistance of Counsel: Failure to Investigate and Introduce Evidence of Innocence

Throughout these proceedings, Petitioner has posited that he has been mistakenly identified and that Constantine was actually the person who entered Wright's house with Buckner and participated in the murder. Constantine, a native of Jamaica, was convicted in 1989 of conspiring to distribute narcotics. Petitioner has alleged a myriad of means by which this theory could have been proven, but not all of these means were presented at the January hearing. These avenues[10] cannot

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[9]Separate Legal Files (indicated by "L.F. at ____") were created each time this case was remanded to the state trial court. The Court's references to the Legal File will be to the one bearing Number 78459, which appears as Respondent's Exhibit BB in this Court's file.

[10]The Court will offer two examples. Counsel's failure to interview Constantine cannot be evaluated because Constantine's testimony was not procured for the hearing. Counsel's failure to present testimony from Joyce Williams (Petitioner's sister) cannot be evaluated because, while her affidavit was submitted, she did not testify at the hearing. See Section II(Q), infra.

be considered because there is no record as to the evidence that could have been obtained. The Court will address only those avenues of investigation that were presented at the hearing or are properly in the record.

This argument is presented as a claim of ineffective assistance of counsel, which is governed by the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). "This standard requires [Petitioner] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense." Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995) cert. denied, 517 U.S. 1214 (1996) (quoting Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Id. at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different.'" Lawrence, 961 F.2d at 115 (quoting Strickland, 466 U.S. at 694).

Id. Failure to satisfy both prongs is fatal to the claim. Pryor v. Norris, 103 F.3d 710, 713 (8th Cir. 1997) (stating there is no

need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness"). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Wiggins v. Smith, 123 S. Ct. 2527, 2542 (2003) (quoting Strickland, 466 U.S. at 694). Assessing prejudice requires the Court to reweigh the evidence of guilt against the totality of evidence, including evidence that would have been introduced but for violations of Strickland's performance prong. See Siers v. Weber, 259 F.3d 969, 974 (8th Cir. 2001), cert. denied, 534 U.S. 1138 (2002) (citing Strickland, 466 U.S. at 695).

Some of the issues raised under this heading justify issuing the writ, while others do not. The Court will address these categories separately.

1. Issues Justifying Issuance of the Writ

Robert Duncan (who passed away in 1996) was lead counsel, and two to three weeks before trial he asked John O'Connor to second chair the trial. Hrg. Tr. At 60-61; Hrg. Tr. At 70, 82-83.[11] O'Connor originally was not expected to do anything more than take notes, but his role expanded over time. Hrg. Tr. At 71. Duncan did not utilize procedures for deposing witnesses, did not informally interview the witnesses, and until O'Connor became involved Duncan did not even have copies of the depositions taken in connection with Buckner's trial. Hrg. Tr. at 24, 74, 84. The State treated the case as an "open file," meaning the copies of all police reports are made and provided to defense counsel, Hrg. Tr. at 22, and opportunities

[11]"Hrg. Tr. At ____" is a reference to the transcript of the hearing held before this Court in January 2004.

to view and obtain copies of photographs videotapes were provided. Hrg. Tr. at 34. Duncan did not obtain copies of the photographs and videotapes used in the investigation. although he may have viewed them in the prosecutor's office. Hrg. Tr. at 78. Duncan obtained and viewed the police reports before O'Connor became involved in the case. Hrg. at 85. 89. Counsel did not attend Buckner's trial and the record is silent as to whether counsel had a transcript of the trial because the question was never asked. See Hrg. Tr. at 77, 85-87.

Kinney's sons, Deonta and Raymond, testified in Buckner's trial. and Deonta identified Constantine as one of the men present. Both boys were also deposed prior to Buckner's trial. Raymond testified that he awoke upon hearing a loud noise, woke his brother, and saw three men in the front room that were not present when the boys went to sleep. Buckner Tr. at 743.[12] He identified one of the men as a person he knew to be "A.J." and said he spoke with a Jamaican accent. Buckner Tr. at 746-48. Deonta testified that he saw "A.J." sleeping at his uncle's house; he had never seen him before but his uncle (Ben) told him the man's name. Buckner Tr. at 788. Deonta later confirmed that the assailants (including "A.J.") had been at his uncle's house earlier that evening. Buckner Tr. at 794. Two of the men tied up the boys but neither was the "chubby" man described as "A.J." Buckner Tr. at 797-98. "A.J." later came to the bedroom to quiet the boys, but when Deonta started to cry he hit the child on the head four times. Buckner Tr. at 798-99. Deonta identified State's Exhibit 121 – a picture of Constantine – as a picture of "A.J.," Buckner Tr. at 799, but Raymond failed to identify the same picture. Buckner Tr. at 778. Deonta also testified that "A.J." spoke with a Jamaican accent. In their depositions, Raymond identified the "chubby" man as having the name "A.J. or Ajax, one of those" and Deonta testified about the "chubby" man, saying "I think his name was A.J."

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[12] "Buckner Tr. at ____" is a reference to the transcript of Buckner's trial.

The police report indicated that Deonta had identified Constantine from a photo array and identified him as "A.J."

As noted, Raymond testified at Petitioner's trial. Consistent with his earlier testimony, Raymond failed to identify Constantine as a person who was present at the murder scene, but he was not asked if he knew the "chubby" man to be "A.J." as he had testified in his deposition. More inexplicably, Deonta did not testify. The Court cannot comprehend why, of the two brothers, counsel opted to call the one who had never identified Constantine's photo when (1) the theory of defense was that Petitioner was being mistakenly identified in Constantine's stead and (2) the other brother had consistently identified Constantine. There was no harm in calling Raymond, as he would have been able to confirm much of Deonta's testimony; the problem is the failure to call Deonta. Raymond's testimony was of little value without Deonta's testimony. More importantly, Deonta's testimony directly implicated Constantine and exculpated Petitioner. Deonta's identify was known to counsel, a reasonable investigation would have revealed his identification of Constantine as the man who entered with Buckner, and no plausible explanation has been offered as to why Deonta could not or should not have been called.

Coupled with this failure is the failure to call Dorothy Merrell ("Dorothy") to testify. Gwen Merrell was Ben's girlfriend; Dorothy was Gwen's mother and she lived with Ben, Gwen and Gwen's children. Crack was sold from the house by both Ben and Dorothy. During her testimony,[13] Dorothy identified Constantine's picture as a person she knew as a Jamaican drug dealer who went by the name of "Jay" or "A.J." She considered him dangerous because he had threatened to kill Kinney's brother when he had used some of "A.J.'s" drugs

[13]Dorothy's testimony was submitted at the January 2004 by way of deposition; the Court has reviewed both the transcript and the videotape of that deposition.

instead of selling them. She further testified that Buckner and "A.J." came to the house looking for drugs on January 5 when Kinney and Wright were present; Wright told the men that he had drugs at his house and they could come over later to get some. Buckner and "A.J." left the house shortly after Kinney and Wright, declaring that they were going to get some drugs. Dorothy also testified that she had never seen Petitioner at her house. While Dorothy's testimony conflicts with Kinney's and Black's in certain key respects, this is of no consequence; it is no surprise that a criminal defendant might present evidence that conflicts with the prosecution's evidence. The Court's concern is the lack of justification for failing to call Dorothy. Her testimony places Buckner and Constantine together shortly before the crime, and describes circumstances that led to Buckner's and Constantine's departure to Wright's house. Dorothy's potential for having information was known to counsel, because there was information in the police reports establishing that she was home on January 5 and 6.

The failure to call these witnesses to the stand violated the performance prong. Having adopted a theory of mistaken identification, and having suggested to the jury that a particular person was the real culprit, the failure to call witnesses who could directly support that theory fell below the range of professional competence. Presenting this testimony may have changed the outcome, so the failure to call these witnesses also prejudiced Petitioner's defense. None of these witnesses or potential witnesses are overwhelmingly compelling. The State's witnesses were under the influence of crack and have provided slightly contradictory descriptions of the events and the assailants. Deonta was a young child, which may be a negative factor in his credibility. In addition, of the four eyewitnesses (including Raymond), only Deonta identified Constantine as the man with Buckner. Dorothy was not an eyewitness to the crime, and her credibility may be suspect given that she was a crack dealer. There is evidence connecting

Buckner and Petitioner, but Dorothy's testimony also connected Buckner and Constantine. Ultimately, the Court is not confident in the jury's verdict and believes there is a reasonably possibility that the outcome would have been different had Deonta and Dorothy testified.

2. Issues That Do Not Justify Issuance of the Writ

Petitioner contends his attorney should have elicited testimony from Frank Johnson. Johnson testified that he knew Petitioner because he was incarcerated with him in 1987 or 1988. Hrg. Tr. at 153-54; 169. He also knows of other members of Petitioner's family. Hrg. Tr. at 155-58; 162-65. He identified and confirmed the statements in his previously-prepared affidavit in which he averred that shortly after the time of Don Wright's murder he was riding on a Metropolitan Transportation Service van and overheard a woman who identified herself as Carol Kinney talking to the driver. The woman and the driver appeared to be friends. She told the driver that "a Jamaican named A.J. had broken into her house and killed her boyfriend." Later, while incarcerated in the Jackson County jail, Johnson "ran into" Petitioner and, after talking with him, realized the importance of the woman's statement. However, there is no evidence that Johnson knew Kinney, or that the speaker actually was Kinney. The Court is empowered to make a credibility finding, and finds Johnson's testimony to be implausible – and that is before one considers the unusual circumstance of Johnson's visit to the workplace of other witnesses involved in this case, Hrg. Tr. at 143-44, which the Court credits despite Johnson's denials. Finally, separate and apart from these issues, Petitioner offers no explanation as to how his attorneys should have known that Johnson had "information" relevant to this case. The Court concludes that the failure to discover this "witness" did not violate Strickland's performance prong, and the testimony would have been so

useless and incredible that its absence did not result in prejudice.

Charles Ross was an investigator for Buckner's attorneys. He interviewed Black, and in his affidavit Ross declares that Black told him Kinney said one of the three men involved in the murder went by the street name of "A.J." Ross did not testify at the January hearing. The Court cannot accept Ross' affidavit as evidence of what Black would say because the affidavit itself is hearsay, and its description of Black's statements constitutes another level of hearsay. It might reasonably be contended that the affidavit should have caused Petitioner's counsel to pursue the matter with Black, but at trial Black was specifically asked whether he remembered "Carol telling you at the hospital that one of the men was "A.J." and he denied that this happened. T.Tr. at 924. Later, counsel discussed Ross' investigative report with Black, and he again denied saying Kinney told him one of the men was A.J. T.Tr. at 930-32.[14] Counsel was precluded from using Ross's report to impeach Black because the statement was not prepared or adopted by Black. Ultimately, there is no violation of either of Strickland's prongs.

Petitioner submitted a deposition of Gwen Merrill in lieu of her live testimony at the January 2004 hearing. She could testify generally to a connection between Buckner and Constantine, but had no information about the day in question. She could also testify that she had never see Buckner with Petitioner, but she did not testify that she was in the house on January 5 or 6 at the times Petitioner was allegedly there so the testimony is of questionable value. Gwen's testimony lends a modicum of support to both her mother's testimony and Petitioner's theory in establishing a connection between Buckner and Constantine, and there would have been no harm in presenting it; however, standing alone it is not particularly

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[14]Kinney also denied making the statement. T.Tr. at 681.

strong evidence and the Court concludes the failure to present it did not prejudice Petitioner's defense.

Petitioner contends that Black's brother, Earl, should have been called to testify that he did not know Petitioner, but that he did know Constantine. The reasoning is based on a theory that the person with Buckner acknowledged Black as Earl's brother, but this is far from clear. Kinney testified that Buckner told the man with him that Black was Earl's brother, and his companion responded by saying "Oh, yeah? Get in here and lay down on the floor." T.Tr. at 620. Kinney provided virtually identical information to the police in an interview following the attacks. This statement is too vague to qualify as proof that the second person knew the men were brothers, much less proof that Earl knew the second person."[15] The Court concludes there was no prejudice from counsel's failure to elicit this testimony from Earl.

Finally, Petitioner contends Duncan's failure to take depositions prior to trial constituted ineffective assistance. The Court declines to rule that failure to depose witnesses in a criminal case is *per se* ineffective assistance. The Court acknowledges that most attorneys believe it best to conduct depositions, particularly in a case that hinges upon eyewitness identification. This does not mean, however, that the Constitution requires it to be done. Duncan chose, for strategic reasons, not to take depositions because he did not want to alert witnesses and prosecutors to his questions. Hrg. Tr. at 75. Depositions are largely an investigatory tool, and for Strickland purposes, the failure to take one should be viewed in concert with whatever other steps were taken to investigate the case. Assuming a constitutionally adequate investigation, the decision whether to take a deposition to "lock in" testimony or to eschew

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[15]Petitioner also points to a statement from Black's deposition in Buckner's case, but the statement only establishes that Buckner knew the men were brothers.

the opportunity to avoid alerting others to counsel's thoughts and tactics becomes a question of strategy that is unreviewable under Strickland.

Nothing said in this Order should be construed as determining that these items of evidence should not be pursued in the event this case is retried. The Court simply holds the failure to present these items did not violate the constitutional guarantee of effective assistance of counsel.

J. Ineffective Assistance of Counsel: Failure to Present Mitigating Evidence

Counsel presented no evidence during the penalty phase. This was due to a complete lack of planning: Duncan was so confident the jury would acquit that he never developed a plan for the penalty phase of the trial. Hrg. Tr. at 93-94, 117-18; see also Hrg. Tr. at 79-80, 98, 114. The failure to plan for such a critical phase of the proceedings cannot be justified and clearly violates the performance prong; constitutionally competent counsel does not fail to develop a plan for the penalty phase of a capital trial.

The Court finds ample evidence existed that could have been presented on Petitioner's behalf in the penalty phase of Mr. White's trial. Olen Barber, the supervisor of the Arapahoe County Jail, testified that Petitioner was helpful in diffusing tensions resulting from an overcrowding problem. He praised Petitioner's involvement in a program called ACAP, Arapahoe County Awareness Program. Petitioner demonstrated strong leadership, assisted inmates with problems, and was very beneficial to the jail staff. Among Barber's duties was the preparation of adjustment and conduct reports for the court, and he rated Petitioner as "excellent." Barber also sent a letter to the judge in Petitioner's case. This was a rare occurrence, but

he considered Petitioner's work to be "above and beyond normal behavior." In his letter he wrote:

> I would like to report that [Petitioner] has continued to maintain excellent demeanor. He has contributed many hours assisting the jail staff with problem inmates.
>
> [Petitioner] has used his leadership abilities very effectively to keep the tension levels down during the overcrowded conditions of the jail during the past year. And I have no means by which to estimate the number of inmates that he has helped during his stay here, but I have received several letters from inmates expressing their appreciation for his help.

Petitioner was also instrumental in the establishment of a drug and alcohol rehabilitation program at the jail.

Bret Dillingham, a licensed clinical social worker, did an extensive study of Petitioner's life history, called a psychosocial history. Dillingham testified that Petitioner's home environment contained "risk factors" that elevated his risk for "bad outcomes" in adolescence and adulthood; his family was impoverished, his father suffered from alcoholism and was abusive to Petitioner, Petitioner's mother and Petitioner's siblings, and there was a family history of criminal activity and substance abuse.

Members of Petitioner's family testified at the January 2004 hearing: Mildred Patterson, Petitioner's aunt; Kareem and Doug Williams, his nephews; Lucille Duncan, his sister; and Amelia (Mia) Duncan, his niece. These family members

supported Dillingham's psychosocial history and findings. They also testified about Petitioner's importance in their lives.

Respondent dismisses this potential evidence, characterizing it as "not impartial" and criticizing the absence of any evidence minimizing, rebutting, or addressing Wright's murder or demonstrating any remorse on Petitioner's part. Respondent also characterizes Dillingham's testimony as being subject to cross-examination. These observations are largely correct, but they do not demonstrate an absence of prejudice. To credit Respondent's position would be tantamount to declaring that there was a certain category of evidence Petitioner was required to present in order to avoid the death penalty, or that the jury was obligated to impose the death penalty, but neither proposition is true. Petitioner was permitted to present, and if presented the jury was obligated to consider, any relevant evidence bearing on the suitable punishment. E.g., Sumner v. Schuman, 483 U.S. 66, 75-76 (1987). A jury is never required to impose the death penalty; it may be persuaded by mercy, compassion, residual doubt, or a host of other factors in determining whether a murderer should be sentenced to death, and the State cannot preclude a jury from considering information regarding those factors. The need for individualized sentencing, as well as the concept of mercy and compassion at the sentencing phase, are well-established in Supreme Court precedent.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated

> offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Monge v. California, 524 U.S. 721, 734 (1998); Clemons v. Mississippi, 494 U.S. 738, 748 (1990); Lockett v. Ohio, 438, U.S. 586, 604-05 (1978).

Nobody can predict what the jury would have decided if it had been presented with the information described above. The jurors may have still voted in favor of the death penalty. On the other hand, there is a reasonable possibility that at least one juror, motivated by compassion or mercy, would have voted for life imprisonment. Death is not an automatic or required sentence, and appeals to compassion, mercy and conscience are sometimes sufficient to sway the outcome. The complete absence of any evidence at the penalty phase deprives the Court of any confidence in the outcome, and there is a reasonable possibility that a different decision would have been rendered but for counsel's performance. Cf. Wiggins, 123 S. Ct. at 2542-44.

K. Eighth Amendment Violation Due to Lack of Mitigating Experience

In an argument related to the preceding section, Petitioner argues counsel's failure to present mitigating evidence violated his rights under the Eighth Amendment (as opposed to the Sixth Amendment as was discussed in Section II.J). The Court rejected this claim in its first Order due to the procedural bar and because the claim is barred by the non-retroactivity rule from Teague v. Lane, 489 U.S. 288, 316 (1989). The Court adheres to the latter ruling, and further observes that counsel was not barred from presenting mitigating evidence; he simply

chose not to do so: in that context, the Court does not see how the Eighth Amendment provides Petitioner any greater protection than his Sixth Amendment right to effective assistance of counsel.

L. Trial Counsel's Conflict of Interest

This claim was previously denied on the merits, and the Eighth Circuit affirmed this decision. White v. Bowersox, 206 F.3d at 782-83.

M. Ineffective Assistance of Counsel on Postconviction Issues

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits. Even if the claim is not moot, it has been rejected in other cases. E.g., Coleman v. Thompson, 501 U.S. 722 (1991); Lowe-Bey v. Groose, 28 F.3d 816 (8th Cir.), cert. denied, 513 U.S. 1061 (1994).

N. Abandonment By Postconviction Counsel

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits.

O. Due Process: Pleading Requirements

This issue, which addressed the pleading requirements in Missouri's postconviction proceedings, is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits.

P. Due Process: Rule 29.15 Deadlines

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits.

Q. Ineffective Assistance of Counsel: Failure to Interview Joyce Williams

Petitioner's sister (Joyce Williams) provided an affidavit averring that she went to work at approximately 5:00 p.m. on January 5, 1987, and left Petitioner at her house to watch her children. She returned home sometime between 2:00 and 4:00 a.m. the next day, and Petitioner was asleep on a bed. She went to sleep around 8:00 a.m., and Petitioner was still sleeping.

Unfortunately, Williams has not testified at any hearing, including the January 2004 hearing. This precludes any opportunity for the Court to judge the value of her testimony. In addition, Williams' affidavit indicates that Petitioner told her he would talk to Duncan and arrange for him to talk to her, but Duncan did not talk to her until after the trial started. There is no evidence as to when Petitioner told Duncan that his sister would be able to provide an alibi, nor is there any indication as to why Williams was not called to testify. Accordingly, the Court cannot grant relief on this issue.

R. Ineffective Assistance of Counsel: Failure to Deliver Opening Statement

Until now, Petitioner has consistently described this issue as counsel's failure to provide an opening statement. This is not an accurate description. Duncan reserved opening statement, T.Tr. at 530, and O'Connor delivered an opening statement at the end of the State's case and before presenting

evidence. T.Tr. at 996-98. Admittedly, the statement was short – but Petitioner has not previously raised an issue about it content or length. Petitioner has also not previously raised an issue about the timing of the statement – which is just as well, as the decision whether to deliver an opening statement before or after the State's case is a classic strategy decision. Petitioner's latest contentions regarding the timing and content of the opening statement are not raised in the First Amended Petition and are not before the Court.

S. Ineffective Assistance of Counsel: Failure to Hire an Expert

Petitioner contends his trial counsel was ineffective for failing to hire an expert to testify that those who use crack cocaine – such as Kinney and Black – suffer damage to their ability to perceive and remember events. Dr. Lee Evans, a psychiatric pharmacist, testified at the January 2004 hearing. He described cocaine's effect on the human body. He reviewed transcripts of Kinney's and Black's testimony at Buckner's trial, Petitioner's trial, and in depositions. He concluded that Kinney's memory of details was "impacted" by her use of crack. Hrg. Tr. 193. He based this conclusion on her admission to extensive crack use and the presence of a multitude of inconsistencies in her statements. Hrg. Tr. at 193-97.

The Court is not persuaded that an expert's testimony would have been particularly helpful at trial or that the failure to retain an expert constituted a violation of the performance prong. Dr. Evans essentially took facts already known to the jury and linked them together in a casual relationship. The jury knew that Kinney was a chronic abuser of crack, and the jury was aware of the inconsistencies in her descriptions of events. Dr. Evans could have told the jury that the inconsistencies were caused by her use of crack, but this information was not terribly important. The important information was not the cause of

those inconsistencies but rather that they existed in the first place. Knowing that the inconsistencies were caused by crack abuse would not have increased their significance.

T. Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances

Petitioner contends that the prosecutor gave insufficient notice of its intent to submit the aggravating circumstances reflected in Instructions 13 and 14 to the jury. He also contends that two of the instructions were vague. The first permitted the jury to find an aggravating circumstance because Petitioner and his cohorts purposely left gas stove's burners on and blew out the pilot light, thereby "created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. . . ." The second allegedly vague instruction asked the jury to consider whether Wright's murder "involved torture, and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman."

Petitioner cannot satisfy Strickland's prejudice prong because Missouri is a "nonweighing" state, meaning that "a finding of at least one aggravating circumstance is a threshold requirement to imposing a death sentence." Sloan, 54 F.3d 1371, 1386 (8th Cir. 1995), cert. denied, 116 S. Ct. 728 (1996). As long as the jury validly found at least one aggravating circumstance, an improper instruction is of no consequence. Here, the jury found additional statutory aggravating factors (e.g., that Petitioner had prior felony convictions, that the murder was committed while other crimes (other attempted murders) were being committed, and that the murder was committed in connection with a robbery). Direct Appeal Legal File at 17-18. assuming an uncured unconstitutional vagueness in the instructions, "[t]he jury's penalty phase verdict is. .

.reliable despite the unconstitutionally vague instruction on the other aggravating factor, and the use of that instruction was harmless." Id.; see also Buchanan v. Angelone, 522 U.S. 269, 272-77 (1998); Ramsey v. Bowersox, 149 F.3d 749, 757 (8th Cir. 1998), cert. denied, 525 U.S. 1166 (1999); Bolder v. Armontrout, 921 F.2d 1359, 1367 (8th Cir. 1990), cert. denied, 502 U.S. 850 (1991).

U. Ineffective Assistance of Trial Counsel: Failure to Object to the Videotaped Lineup

Petitioner contends that when Petitioner was placed in a videotaped lineup on May 26, 1987, he was in jail awaiting trial on an unrelated robbery charge. He alleges that his attorney in the robbery case was not contacted prior to the lineup, and his trial counsel in this case was ineffective for failing to object to the use of the lineup for this reason. The Supreme Court has held that "a pretrial corporeal identification conducted after a suspect has been indicted is a critical state in a criminal prosecution at which the Sixth Amendment entitles the accused to the presence of counsel." Moore v. Illinois, 434 U.S. 220, 224 (1977). However, this right was not implicated here because the lineup was on videotape.

> In United States v. Ash, 413 U.S. 300, (1973), the Court held that the Sixth Amendment does not require that defense counsel be present when a witness views police or prosecution photographic arrays. A photographic showing, unlike a corporeal identification, is not a 'trial-like adversary confrontation' between an accused and agents of the government; hence, 'no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.' Id. at 317.

Id. at 227.

V. Ineffective Assistance of Counsel:
Failure to Impeach Detective Gibson

Petitioner contends his trial attorney was ineffective for failing to impeach Detective Gibson with evidence that he had committed "improper actions" in prior cases. This claim is raised specifically with regard to Detective Gibson's denial that he took Petitioner's picture. The Court rejects this claim for several reasons. First, it is doubtful that Detective Gibson could be impeached in this manner. Second, Detective Glynn admitted to taking Petitioner's photograph. Third, the prejudice to Petitioner is completely absent. There is no denying that a photograph was taken, nor is there any indication that Detective Glynn lied when he said that he took the picture, and Petitioner has not really explained why it mattered who took the picture.

It may be that Petitioner is trying to suggest that Detective Gibson took a picture and showed it to Kinney outside the context of a proper lineup, or showed her the picture Detective Glynn took. The problem is there is no evidence that this ever happened, see Part II(SS)(2), infra, so Petitioner is simply speculating. Petitioner cannot speculate that an event might have happened, then impeach denials of those events.

W. Ineffective Assistance of Trial Counsel:
Failure to Object to Prosecutor's Use of
Peremptory Challenges and Certain Strikes for Cause

Petitioner contends that the prosecutor utilized peremptory challenges to eliminate five jurors who had "conscientious scruples" against the death penalty and six jurors who expressed difficulty believing witnesses who used illegal drugs. He also

claims that his trial counsel failed to object to two of the prosecutor's requests to strike jurors for cause.

The first aspect of this claims is not cognizable because it would require a new rule of criminal procedure, and new rules may not be announced (absent circumstances not present here) in a habeas proceeding. Teague v. Lane, 489 U.S. 288, 316 (1989). The use of strikes in this manner is not barred by Batson v. Kentucky, 476 U.S. 79 (1986), and Petitioner would require a new constitutional rule in order to demonstrate that he was prejudiced by the failure to object. The Court cannot find prejudice absent a rule prohibiting the prosecutor's use of strikes for these reasons, and it cannot create the rule in light of Teague.

The second aspect is clearly lacking in merit. Venireman Heman agreed that he did not know if he "could be fair to both the State and the defendant" because of his views regarding drugs. T.Tr. at 333. There is no indication as to what counsel should have done, and agreeing to strike Mr. Heman for cause was reasonable given that the murder was related to a drug transaction and the jurors would be assessing the penalty if Petitioner was found guilty. In addition to her views about drugs, Venirewoman Meysenburg declared that she did "not take stress very well" and was suffering from a migraine headache after just one day of the jury selection process. Tr. at 370-71. She also revealed that she would "probably" vote automatically for life without parole if Defendant were found guilty. Tr. at 369. It is not clear whether the basis for the strike for cause was Ms. Meysenburg's views regarding drugs, her inability to consider the death penalty, or her health, Tr. at 384; regardless, the record reveals that the strike for cause was appropriate so failing to object was not ineffective assistance.

X. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Closing Argument

During Penalty Phase

The claim was previously denied on the merits, and the Eighth Circuit affirmed this decision. White v. Luebbers, 307 F.3d at 730.

Y. Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver

During cross-examination, Petitioner's trial counsel asked Detective Gibson whether he read Petitioner his rights prior to interviewing him. He also established that Petitioner was willing to talk with Detective Gibson and did not ask for a lawyer. T.Tr. at 775-76. On redirect, the prosecutor asked whether Detective Gibson had asked Petitioner to sign a waiver of his Miranda rights; Detective Gibson said that he had. T.Tr. at 784. Petitioner's trial counsel then approached the bench to object; after the trial court forced him to assert a ground for his objection, he declared "it's irrelevant, it's immaterial, and the fact he signed a consent form has nothing to do with it because he talked to them." T.Tr. at 785. This objection was overruled. Upon resumption of the redirect examination, Detective Gibson reaffirmed that he had asked Petitioner to sign a waiver form and he refused to do so. T.Tr. at 786.

Petitioner contends his appellate counsel was ineffective for failing to challenge the testimony on the grounds that it constituted an infringement on Petitioner's constitutional right to remain silent. The problem with this argument is that trial counsel did not make a constitutional objection; he objected on the basis of relevant. The issue Petitioner claims his appellate counsel should have raised was not preserved at trial and would have been reviewed only for plain error if raised on appeal.

Under Strickland, in evaluating whether an attorney provided objectively unreasonable assistance, a reviewing court should minimize the effects of hindsight and recognize a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Because of this presumption and the reality that effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment does not require that appellate counsel raise every colorable or non-frivolous issue on appeal. Absent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of "sound appellate strategy." The decision to forgo a plain error claim is usually the result of a reasonable winnowing of weaker appellate claims. Therefore, we rarely conclude that an appellate attorney's performance was constitutionally deficient for not raising such a claim.

Roe v. Delo, 160 F.3d 416, 418 (8th Cir. 1998) (internal citations and quotations omitted). There is no contrary evidence, so the presumption this was sound strategy stands, and there was minimal likelihood of success. By the time the redirect started, the jury already knew that Petitioner had talked to Detective Gibson. Thus, the discussion of the *Miranda* waiver could not be understood as a comment on his right to remain silent because Petitioner was not silent. The discussion could not be understood as a comment about his right not to testify, as Detective Gibson's testimony was too attenuated to raise this issue. The Court rejects the claim.

Z. Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's In-Court Identification of Petitioner

During his direct examination, Black testified that he was shown approximately four videotape lineups in September 1987; some of the men looked like the men involved in the crime, but he was unable to positively identify anyone in those

lineups. T.Tr. at 880. On the Saturday before trial, he was shown two videotapes, T.Tr. at 880-81, and was prepared to testify that one of the men was (or at least appeared to be) the man who slashed Wright's throat. The lineup containing the picture in question was one of the four shown to Black in September 1987. T.Tr. at 883, 892-93. On the Monday the trial started, prosecutors told Duncan that Black had identified Petitioner as the man who entered with Buckner. Trial counsel misunderstood the prosecutor and thought he meant that Black had positively identified Ford (who was also in the lineup). T.Tr. at 881-82, 884. Ultimately, the trial court overruled an objection based on the timeliness of the prosecutor's disclosure - the only objection made at trial on this matter. T.Tr. at 884-86.

Petitioner now contends that his appellate counsel was ineffective for failing to challenge Black's identification as unreliable because the lineup was unduly suggestive based on its contents and Black's "repeated exposure" to it. He also argues that appellate counsel should have raised a claim based on the fact that trial counsel was not permitted to be at the private screening held by the prosecutor. None of these objections were made at trial and would have only been reviewed for plain error, so appellate counsel could reasonably refrain from raising them. See Roe, 160 F.3d at 418.

Black's two viewings of the tape occurred approximately sixteen months apart - hardly the repetitious showing Petitioner insinuates occurred. As noted earlier, the Supreme Court has held the Sixth Amendment is not implicated when a criminal defendant is included in a photographic or video array. See Moore v. Illinois, 434 U.S. at 227. The Court is concerned about the suggestiveness of the lineup itself, but Petitioner has

not provided much in the way of legal analysis on this issue.[16] Suggestiveness alone does not qualify an identification. Manson v. Brathwaite, 432 U.S. 98, 112-14 (1977). The key inquiry is reliability, and the factors to be considered

> include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against the factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 114 (citing Neil v. Biggers, 409 U.S. 188, 199-200 (1972)).

There are five men in the lineup. One man is wearing a prison shirt and pants, which are noticeable for their pastel-blue color. Petitioner was wearing a prison shirt, but nobody else in the lineup was wearing prison clothing. Counting Petitioner, only two men had a moustache and beard, and the other one was not wearing prison clothing. After initially indicating that some of the men in four different lineups looked like the men involved in the murder, sixteen months passed - at which time Petitioner is shown less lineups that contain a total of two people sharing the attributes of both a beard and moustache, and one of those two individuals was wearing a prison shirt. While this describes a certain amount of suggestiveness, the distance in time between the viewings undercuts its effect to some extent - and, conversely, the distance in time also undercuts the reliability of Black's identification.

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[16]Contrary to Respondent's assertion, the Court has not previously considered the merits of this claim: the Court held it was defaulted because evidence about the lineup was not developed in state court.

Ultimately, the question is not whether admitting Black's identification was error, but whether it was *plain* error, such that the failure to raise the issue on appeal denied Petitioner his Sixth Amendment right to effective counsel. The Court concludes that there was no plain error.

AA. Actual Innocence

Petitioner presents his actual innocence as a substantive ground entitling him to relief. In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court pointed out that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Although actual innocence plays a role in habeas proceedings, it does so only as a supplement to a constitutional claim - not as an independent claim. Id. at 404. The distinction was emphasized in Schlup v. Delo: a free-standing claim of actual innocence is governed by Herrera, whereas a claim of actual innocence used to demonstrate cause and prejudice to overcome a procedural bar to federal review is governed by a different standard (as announced in Schlup). 513 U.S. 298, 315-17 (1995). The Court went on to explain the different standards as follows:

> If there were no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [petitioner's] innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, [petitioner's]

> threshold showing of innocence would justify a review of the merits of the constitutional claims.

Id. at 317.

Subsequent Eighth Circuit opinions do not make clear whether Herrera completely bars free-standing claims based on actual innocense or whether, in light of Schlup, it merely erects an extremely high standard for such claims. Herrera was decided in 1993, and Schlup was decided in 195. Four months after Schlup was decided, the Eighth Circuit cited it for the proposition that a free-standing claim of actual innocence is cognizable and relief can be granted only if new facts ""unquestionably establish [the petitioner's] innocence."" Allen v. Nix, 55 F.3d 414, 417 (8th Cir.), cert. denied, 516 U.S. 1014 (1995) (quoting Schlup, 513 S. Ct. at 317) Later, in Meadows v. Delo, the Eighth Circuit was again presented with a free-standing claim of actual innocence and declared that "reliance of Schlup is misplaced." 99 F.2d 280, 283 (9th Cir. 1996). Instead the Meadows Court relied on Herrera to hold that the "claim of innocence based on newly discovered evidence is not cognizable on habeas review." Id. In Cornell v. Nix, the Eighth Circuit relied on Allen and subjected a free-standing claim of actual innocence to the "unquestionable innocence" started. 119 F.3d 1329, 1334 (8th Cir. 1997). Cases continue to fall on both sides of the issue, culminating in Burton v. Dunmire, which relied on Meadows to reject the claim out of hand. 295 F.3d 839, 848 (8th Cir. 2002), cert. denied, 538 U.S. 1002 (2003).

Resolution of Petitioner's claim is easy if the claim is not cognizable: if it is not cognizable, no relief can be granted. However, because the law in this Circuit is not clear, it is prudent for the Court to consider Petitioner's claim under the standard described in Cornell and Allen. This, too, is an easy matter: Petitioner's guilt and defense both depend on the

credibility of eyewitnesses, and most of the testimony is subject to a certain degree of skepticism for a variety of reasons. The Court cannot conclude that Petitioner is "unquestionably innocent."

BB. Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer

In his Amended Petition Petitioner asserted that, while the jury was deliberating, the prosecutor offered to permit Petitioner to plead to second degree murder and receive a sentence of fifteen years. He claims that his trial counsel failed to discuss the plea offer with him, thereby failing to provide ineffective assistance. Petitioner did not present evidence of an offer, and the Court is unable to find an offer was made, Hrg. Tr. at 28-29, 31-33, so this claim fails on the merits.

CC. Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel

On February 3 - the Friday of the first week of trial - Petitioner's lead trial counsel was not present at the start of the day's proceedings. The jury was not given any reason for his absence. T.Tr. at 707. The record does not reflect that he ever appeared at trial that day, and there is no indication he said anything on the record. Petitioner had suggested that Duncan was speaking at a Continuing Legal Education Seminar, but the only evidence of such an event establishes that his presentation occurred after the penalty phase of the trial. Hrg. Tr. at 112-14. Ultimately, it does not matter why Duncan was absent. The critical inquiry was whether Petitioner's Sixth Amendment rights were violated in his absence, and the mere absence of lead trial counsel is not a *per se* violation of that right the focus must be on the events that occurred in Duncan's absence, during which time O'Connor was present. Admittedly, O'Connor became involved in the case at the last minute and

his duties originally were minimal, but by the time of trial, it was contemplated that O'Connor would play a meaningful role in the defense. Petitioner can prevail on this claim on by identifying something O'Connor did or failed to do that constituted ineffective assistance because absent such a showing there is no prejudice from Duncan's absence. Petitioner has not done this so the claim must be denied.

DD. Judicial Bias During Postconviction Proceedings, Part I

The Court denied relief on this claim, and the Eighth Circuit affirmed in the first appeal. White v. Bowersox, 206 F.3d at 783.

EE. Judicial Bias During Trial

This claim was procedurally defaulted when it was not raised on direct appeal. Thus, it was procedurally defaulted before the postconviction proceedings, and the Eighth Circuit's rulings regarding the procedural bar do not affect issues that were defaulted during or before direct appeal. White v. Luebbers, 307 F.3d at 727 n.2.

FF. Judicial Bias During Postconviction Proceedings, Part II

The Court denied relief on this claim, and the Eight Circuit affirmed in the first appeal. White v. Bowersox, 206 F.3d at 783.

GG. Ineffective Assistance of Trial Counsel: "Bad Loser" Comment

During small-group voir dire, one of the jurors related an event that occurred when he had served on a jury previously.

He explained that following the verdict one of the lawyers told him that some of the State's witnesses had lied. He did not recall whether it was a prosecutor or defense attorney. T.Tr. at 417-18. A lengthy discussion (out of the jury's hearing) about the possibility that these comments poisoned the small group ensued. The trial judge struck three of the five potential jurors for cause, T.Tr. at 444, leaving only Venirepersons Benedict (#87) and Ford (#89). Benedict and Ford were returned for additional voir dire, T.Tr. at 454, and the prosecutor was permitted to explain that the incident "was an example of a defense attorney being a bad loser" and "that it certainly wasn't the prosecutor that said a witness lied, and that . . .in fact wasn't the case." T.Tr. at 455. Petitioner contends that his trial counsel provided ineffective assistance in failing to object to these statements.

Petitioner cannot demonstrate prejudice. After excluding those jurors who were struck for cause, peremptory strikes for the main panel were made against jurors with numbers under #79. T.Tr. at 495-96. Benedict and Ford were candidates to be the second alternate, T.Tr. at 496, but both were struck peremptorily. T.Tr. at 499 (identifying jurors and alternates). It is true that at the time of Petitioner's trial, Missouri law provided "that criminal defendants are entitled to a 'full panel of qualified jurors before being required to make peremptory challenges' and that failure to sustain a meritorious challenge for cause is prejudicial error." Sloan, 54 F.3d at 1387 (quoting State v. Wacaser, 794 S.W.2d 190, 193 (Mo. 1990) (en banc)).[17] However, Petitioner cannot argue that his use of a peremptory

[17] Wacaser was legislatively overruled long after Petitioner's trial. Thus, at the time of his trial, Petitioner was entitled to a fully qualified, untainted jury upon which to exercise his peremptory strikes.

challenge on either Benedict or Ford[18] constitutes prejudice under Strickland because none of the alternates were called upon to deliberate. T.Tr. at 1027-29 (jurors identified when polled at the end of the case). Thus, Petitioner was not prejudiced by the prosecutor's comments and the resulting "need" to use a peremptory to eliminate Benedict or Ford as a potential alternate.

HH. Ineffective Assistance of Postconviction Counsel, Part II

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits. Even if the claim is not moot, it has been rejected in other cases. E.g., Coleman v. Thompson, 501 U.S. 722 (1991); Lowe-Bey v. Groose, 28 F.3d 816 (8th Cir.), cert. denied, 513 U.S. 1061 (1994).

II. Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims

Within this argument, Petitioner claims his appellate counsel should have raised the following grounds: "verdict directing instructional error, Brady violation by the state, challenges to the prosecution's guilt phase and penalty phase closing arguments." Some of these claims are discussed in greater detail elsewhere in this [illegible]. The argument regarding the verdict director lacks merit, Part II(LL), infra, so his claim of ineffective assistance of counsel must be rejected as well. Similarly, his Brady claim lacks merit, appeal. Finally, Petitioner has not provided sufficient detail about the remaining portions of this claim to permit meaningful discussion (and, in

[18]Both were candidates to be the second alternate, and neither was chosen. Thus, it can be deduced that the prosecutor used his peremptory on either Benedict or Ford and Petitioner used one on the other.

any event, the Court notes that any appeal would have sought only plain error review).

JJ. Ineffectiveness of Trial Counsel: Failure to Request Mistrial During Prosecutor's Closing Argument

During his closing argument following the trial's guilt phase, the prosecutor told the jury that "if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended-" Supp. T.Tr. at 30.[19] Petitioner's trial counsel objected, and the trial court sustained the objection and instructed the jury to disregard the prosecutor's comment. Supp. T.Tr. at 32-33. Prior to the delivery of the cautionary instruction to the jury, Petitioner's trial counsel moved for a mistrial but also stated that "as a practical matter I don't want a mistrial," Supp. T.Tr. at 31-32. After the objection was sustained in open court, trial counsel approached the bench again and moved for a mistrial, and the motion was denied. Supp. T.Tr. at 33.

On direct appeal, Petitioner challenged the trial court's denial of the motion for mistrial. After recounting the circumstances described above, the Missouri Supreme Court held that "[u]nder these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. The defendant cannot complain about the denial of a mistrial when his counsel plainly told the court that he did not want this relief." White I, 813 S.W.2d at 866.

Petitioner does not challenge the denial of the mistrial; instead, he argues that trial counsel's actions constituted

[19] This is a reference to the Supplemental Trial Transcript, which contains the prosecutor's closing argument.

ineffective assistance. Whether to seek a mistrial is a strategic decision, particularly given that Duncan believed (albeit mistakenly) that there was a good chance the jury would acquit Petitioner. Assuming the performance prong was violated, the Court discerns no prejudice. The curative measures employed by the trial judge were more than adequate, and there is not a reasonable probability that a mistrial would have been ordered (particularly since the trial judge denied the belated request).

KK. Ineffective Assistance of Appellate Counsel
Failure to Raise Claim Based on *Brady v. Maryland*

The prosecution in a criminal manner has a constitutional obligation to disclose exculpatory evidence to the defendant. See Brady v. Maryland, 373 U.S. 83 (1967), Giglio v. United States, 405 U.S. 150 (1972). "A finding of materiality of the evidence is required under Brady." Id. at 154. Exculpatory evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999) (quotation omitted). Non-disclosure merits relief only if the prosecution's failure "undermines confidence in the outcome of the trial." Kyles v. Whitely, 514 U.S. 419, 434 (1995) (quotation omitted). The Supreme Court has rejected any distinction between impeachment evidence and exculpatory evidence. See Bagley, 473 U.S. at 676. The "individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437.

Petitioner contends Brady was violated when the picture Detective Glynn took was not disclosed until trial.[20] For the

[20]Petitioner has also offered a letter from Duncan's predecessor in an attempt to establish that the picture's existence was denied by the State until trial. This letter contains and constitutes hearsay, and the Court must disregard it.

sake of argument the Court will assume the picture was not disclosed until trial,[21] but the claim still fails because the picture is not evidence of anything. It has no role in this case unless it was shown to one of the victims, but there is no evidence that this happened. It is not even clear that the picture was used as part of a photographic array. The issue is discussed in greater context in Part II(SS)(2), *infra*. Moreover, Brady was not violated even if the picture was not revealed until trial, because Petitioner has not demonstrated that the late disclosure prevented Petitioner from obtaining a fair trial. Cf. United States v. Parker, 267 F.3d 839, 846 (8th Cir. 2001), cert. denied, 535 U.S. 1011 (2002). Petitioner was not denied ineffective assistance of counsel because there is no basis for arguing that Brady was violated.

LL. Ineffective Assistance of Appellate Counsel: Verdict Director

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

MM. Ineffective Assistance of Postconviction Counsel, Part III

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the

[21] At the hearing, O'Connor testified that he saw it for the first time at the trial. Hrg. T. at 81. There is no evidence as to whether the photograph was in the file available for counsel's inspection or whether Duncan was aware of its existence.

merits. Even if the claim is not moot, it has been rejected in other cases. E.g., Coleman v. Thompson, 501 U.S. 722 (1991); Lowe-Bey v. Groose, 28 F.3d 816 (8th Cir.), cert. denied, 513 U.S. 1061 (1994).

NN. Ineffective Assistance of Trial Counsel: Former Prosecutor as Defense Attorney

O'Connor was Trial Director for the Jackson County Prosecutor's Office when Wright's murder was being investigated and when the indictment in this case was filed. He also speculates that O'Connor "reviewed the case and assigned it to Mr. Hall and Mr. Peters for trial. He also may have been involved in the decision to seek the death penalty." Prior to jury selection, Duncan asked Petitioner if he understood that O'Connor would be assisting in the case. He also indicated his understanding that O'Connor "until about a year ago was in the Prosecuting Attorney's Office" but that he had not reviewed Petitioner's case during his employment as a prosecutor. T.Tr. at 4-5.

Petitioner now contends that O'Connor's status as a former prosecutor constituted ineffective assistance of trial counsel. His mere status as a former prosecutor does not violate Strickland. The Court finds that O'Connor had no involvement in Petitioner's case while he was a prosecutor, Hrg. Tr. at 68-69, so there is no factual basis for this claim.

OO. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Opening Statement

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that

anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

PP. Proportionality Review

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

QQ. Ineffective Assistance of Trial Counsel: Wasting a Peremptory Strike

Petitioner contends that his trial counsel provided ineffective assistance when he "wasted" a peremptory strike on a prospective juror that had already been struck, but the record belies Petitioner's factual assertions. The venireperson in question, Cassandra Hughes, was number 60 on the panel. She was questioned during small-group voir dire, T.Tr. at 352-53, and neither party asked that she be struck for cause. T.Tr. at 353-54. She was not listed among those whom the parties agreed to strike. T.Tr. at 493-94 (discussion of panelists the parties mutually agreed to excuse). Her number was low enough to include her as a potential juror. T.Tr. at 496. While the attorneys were considering their peremptory strikes, Hughes reported that she had the flu and the trial court asked the parties to confirm their agreement that she could be sent home immediately. Although the parties agreed with the factual statement that she could be excused, they did not agree that she would be struck for cause. Specifically, the prosecutor declared "[f]or now I think all we need to do is say that she's going to be

excused because the defendant may end up striking her as one of their peremptories. . . ." T.Tr. at 498. The discussion then turned to the subject of the alternate jurors. The prosecutor never agreed that Hughes could be excused for cause; instead, the participants were simply acknowledging defense counsel's intent to strike Hughes, thereby permitting Hughes to leave immediately instead of waiting in the jury room, sick with the flu, until she was later formally dismissed. None of Petitioner's peremptory strikes were "wasted."

RR. Right to Be Present at Critical Stages

This claim was procedurally defaulted when it was not raised on direct appeal. Thus, it was procedurally defaulted before the postconviction proceedings, and the Eighth Circuit's rulings regarding the procedural bar do not affect issues that were defaulted during or before direct appeal. White v. Luebbers, 307 F.3d at 727 n.2.

SS. Ineffective Assistance of Trial Counsel: Myriad of Claims

Within this single claim, Petitioner asserts several claims of ineffective assistance of trial counsel. He contends his attorney was ineffective for (1) failing to elicit helpful testimony from Ben Kinney, (2) failing to challenge suggestive pretrial identification procedures, (3) failing to effectively impeach Ernest Black and Carol Kinney, (4) failing to prepare for trial, and (5) eliciting a positive identification of Petitioner from Ernest Black. The Missouri Supreme Court deemed the first four issues to be procedurally defaulted, but addressed the fifth claim on the merits; this Court has not yet had the opportunity to consider the merits of the first four issues.

1. Failing to Elicit Testimony from Ben Kinney

In paragraphs 344-46 of his First Amended Petition, Petitioner describes the evidence that Ben Kinney could have provided. He allegedly could have testified that Wright and Kinney were using and selling cocaine and that two men known as "A.J." and "Josh" had threatened to kill them. The jury was already aware that Wright and Kinney were using cocaine, and the fact that they were also selling it has no independent relevance except (maybe) to connect them to the men who allegedly wanted to kill them. However, Ben Kinney did not testify at the January 2004 hearing; so the Court has no basis for determining that Petitioner was prejudiced by the failure to elicit any testimony from him.

2. Failing to Challenge Suggestive Pretrial Identification Procedures

In an argument related to the one addressed in Part II[Z], supra, Petitioner contends his attorney should have challenged the suggestive identifications made by both Kinney and Black. In September 1987, Black was shown approximately four videotaped lineups; he failed to make a positive identification. T.Tr. at 880. The weekend before trial - approximately sixteen months later - Black was shown two of those same lineups. T.Tr. at 880-81. Petitioner's attorneys were not contacted prior to the January 1989 viewing, nor were they present for it. The next Monday - the day trial started - Duncan was told that Black had identified the third man in the lineup as the second man at Kinney's house, but he misinterpreted the information to mean that Black had identified the third man at Kinney's house. The third man at Kinney's house was fairly well established as being Cleveland Ford. When Duncan's misunderstanding came to light on the Saturday of trial,[22] Petitioner's counsel objected on the basis of the lateness of the disclosure, but the trial court held

[22]This is not a misprint: the transcript reflects that trial proceedings occurred on February 4, 1989, which was a Saturday.

that the objection was untimely. T.Tr. at 881-86. Black denied receiving any information about the individuals in the videotapes prior to viewing them in January 1989. T.Tr. at 886. He also denied remembering whether the videotapes he saw immediately before trial were shown to him in September 1987. T.Tr. at 954.

Several issues related to Black's identification were discussed and rejected in the Court's second order, and the Court declined to issue a Certificate of Appealability. Further discussion is not warranted, except for one respect: Petitioner's contention that an objection should have been made based on the suggestiveness of the lineups. As noted earlier in Section II(Z), the real issue is reliability; suggestiveness is a factor to be considered when evaluating reliability. While the circumstances of Black's identification and the characteristics of the lineup certainly represented grounds for impeachment of both victims, the Court does not believe the identification was unconstitutionally unreliable.

As part of this argument, Petitioner has insisted that both Kinney and Black were shown the picture Detective Glynn took of Petitioner. A showing of a single photograph is a factor in determining the reliability of an identification, but the Court is unable to find this happened. Support for Petitioner's suspicions consists largely of speculation; there is not testimony to support it. See T.Tr. at 759, 771-72, 782-83 (testimony of Detective Gibson denying that he showed a single picture to Kinney); Hrg. Tr. at 257, 260 (same); T.Tr. at 747, 750 (testimony of Detective Glynn denying that he interviewed Kinney or showed her Petitioner's picture); T.Tr. at 637-44 (testimony from Kinney describing her identification of assailants); Hrg. Tr. at 364-67, 393-95 (testimony of Kinney disavowing any memory of seeing Petitioner's picture before viewing the lineup, and never indicating that she saw any

picture (including Petitioner's) in isolation): T.Tr. at 662-63 (similar testimony).

Petitioner makes much of the fact that a picture, if available, would be "used" in the investigation, but this does not establish that it would be used in a suggestive or otherwise inappropriate manner. As Detective Gibson explained, a photograph (such as the one taken by Detective Glynn) would be used as part of an array comprised of several photographs. Hrg. Tr. at 263-64. Petitioner also points to Kinney's deposition from Buckner's trial, wherein she indicated (at pages 97-98) that she saw Petitioner's picture before identifying him from the lineup. However, that passage does not indicate that she saw Petitioner's picture in isolation; in fact, on page 18 of her deposition she denied ever being shown just one paragraph. The Court finds that neither surviving victim was shown a photograph of Petitioner by itself.

3. Failing to Effectively Impeach Kinney and Black

This claim is described in paragraphs 357-58, and alleges that Kinney and Black should have been impeached with their prior inconsistent statements and with testimony from Ben Kinney. As noted earlier, Ben Kinney's testimony has not been presented to any tribunal, so this aspect of the claim must fail. The Court also notes that Kinney and Black were impeached on a variety of inconsistencies in their statements. The Court holds that neither of Strickland's prongs was violated.

4. Failing to Prepare for Trial

This claim raises concerns including Duncan's failure to interview witnesses, conduct depositions, or plan for the penalty phase. These issues are raised more specifically and more thoroughly in the context of other claims, so this claim is rejected as duplicative.

5. Eliciting Harmful Testimony from Black

This Court rejected this claim on the merits in its first Order. The Court's holding is repeated below:

> [T]he Missouri Supreme Court affirmed the trial court's finding that "counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before and at trial. At most, therefore, Black's response to counsel's questions was cumulative." White III, 939 S.W.2d at 898. This finding is supported in the record and is entitled to deference. E.g., Pryor, 103 F.3d at 712-13. In light of this finding, Petitioner cannot satisfy either of Strickland's prongs.

This issue was not included in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims.

TT. Conflict of Interest, Second Appeal

This claim was previously denied on the merits, and the Eighth Circuit affirmed this decision. White v. Bowersox, 206 F.3d at 782-83.

UU. Restrictions on Cross-Examination

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

WW. Cumulative Errors (Generally)

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestions that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

III. CONCLUSION

For the foregoing reasons, Petitioner's application for a Writ of Habeas Corpus is granted in part and denied in part. Petitioner's conviction and death sentence must be vacated. Within forty-five days after this Order becomes final (including any appeals that may be taken), the State must commence a new trial; if the State does not do so, Respondent must release Petitioner from custody.

IT IS SO ORDERED.

/s/Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Dated: June 14, 2004

United States Court of Appeals,
Eighth Circuit.

Leamon WHITE, Appellant,
v.
Al LUEBBERS, Appellee.
No. 01-3044WM.

Submitted: Sept. 10, 2002.
Filed: Oct. 11, 2002.

Stephen D. Hawke, argued, Jefferson City, MO, for appellee.

Before HANSEN, Chief Judge, RICHARD S. ARNOLD and LOKEN, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

This is a petition for habeas corpus brought by Leamon White, a prisoner in state custody. Mr. White has been sentenced to death for first-degree murder. His case is now before us for the second time. On the prior appeal, *White v. Bowersox*, 206 F.3d 776 (8th Cir.), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000), we remanded the case to the District Court "for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits." 206 F.3d at 783.

On remand, there was disagreement about the meaning of this Court's directions. The principal issue addressed in our previous opinion was the Missouri doctrine of "abandonment," under which the omissions of an appointed post-conviction lawyer can be so serious that the lawyer is said to have "abandoned" the client, with the result, in most cases, that the client is allowed to proceed anew. The Missouri courts had held that Mr. White had been abandoned by his appointed

post-conviction lawyer, but had limited the remedy for this default. Our major holding was that the remedy should not have been limited, and that the procedural bar asserted by the State (the state courts' limitation of the remedy for abandonment) was not adequate to prevent federal habeas corpus review on the merits. On remand, the State took the position that only those claims contained in Mr. White's second amended state-court post-conviction motion were open for review on federal habeas. The State argued that the rationale underlying our holding that the remedy for abandonment had been impermissibly limited went only that far, and that it did not extend to opening up for federal habeas merits review other constitutional claims asserted by Mr. White. Petitioner, on the other hand, argued that our previous opinion should be applied as written, that all of his constitutional claims "except those claims that the District Court ha[d] already addressed on the merits," 206 F.3d at 783, should be decided by the District Court without regard to procedural default arguments asserted by the State.

The District Court agreed with the State on this point. It observed that a number of petitioner's claims had not been raised in his second amended post-conviction motion in the state courts, and that those claims appeared to be defaulted even if the claims raised in the second amended motion were now open for review. The Court observed further that our previous opinion had been "limited to consideration of a single argument regarding procedural default." *Leamon White v. Al Luebbers*, No. 97-1663-CV-W-3, slip op. 3 (W.D. Mo., opinion filed April 3, 2001). Accordingly, the District Court proceeded to decide the merits of only those claims that had been raised in petitioner's second amended motion. As to the other claims urged by petitioner, it adhered to its holding, made in the previous stage of the case, that these claims were procedurally barred for reasons unrelated to the abandonment doctrine.

The major issue before us on this, the second appeal, is the scope of our remand. The District Court and both parties agree that that Court was bound to proceed in accordance with our directions, but they disagree as to what these directions were. It is now our job to decide the legal effect of our previous opinion. That this question has arisen at all is due, at least in part, to some lack of clarity in our previous opinion, and the writer of this opinion (who also wrote the first one) acknowledges this responsibility.

On full consideration, we now hold that the terms of remand embodied in the previous opinion require the District Court to consider, on their merits, all federal constitutional claims that have not previously been decided on the merits, with a limited exception to be described later in this opinion. As to those claims that the District Court did decide on the merits after the remand following our previous opinion, we affirm. The judgment of the District Court will be affirmed in part, reversed in part, and the cause remanded for further proceedings to be set out at the end of this opinion.

I.

A description of the procedural context surrounding the first appeal will help us explain the conclusion we are reaching. In that case, petitioner raised a variety of constitutional claims. The State asserted that many of them were procedurally barred. The petitioner responded with two main arguments: that the state rules of procedure asserted as bars had not been applied regularly enough to constitute adequate and independent state grounds, and that, in any event, he had made, or could make, a showing of actual innocence, which would avoid the effect of any procedural bar. The first of these two arguments, which we may call, for present purposes, "inadequate state grounds," itself had two parts: that the state rule requiring fact pleading in post-conviction motions had been applied too strictly, or in an unexpected way, to some of the claims asserted in petitioner's

first amended post-conviction motion; and that the state courts' limitation of the remedy for abandonment was unexpected and could not have been anticipated beforehand. (Thus, this limitation of the remedy could not be said to have been regularly applied, a requirement of the adequate-state-ground doctrine.)

As our study of the case went forward following the argument, it began to seem that this last point, which can be referred to in shorthand as the abandonment point, would go in petitioner's favor. There were many claims and several arguments for avoiding procedural bars, and we were uncertain whether all of the issues would need to be addressed. We thought it prudent, therefore, to consult counsel for both sides. On December 23, 1999, the following order was entered:

> As we understand the case, appellant makes two basic arguments for avoidance of a procedural bar: inadequate state ground and actual innocence. If the Court decides that either one of these arguments is well taken, is there any reason why it would need to address the other one? Are there any issues the merits of which would be opened up, so to speak, by holding in favor of appellant on the question of actual innocence, but not by a holding in favor of appellant on the issue of adequate state ground?

As indicated, at the time this order was entered, we thought of the phrase "inadequate state grounds" as a shorthand description of two distinct but related procedural-bar issues: inadequate pleading and abandonment. We thought of these issues as interrelated, in the sense that, if the abandonment issue went in petitioner's favor, all claims pleaded in the second amended motion, which itself had incorporated both the original motion and the first amended motion, would be open for review. Thus, it would not be necessary separately to decide the

pleading issue, which concerned only the first amended motion. This view is reflected in the opinion we ultimately filed. There, we said:

> The predominant issue on appeal is whether the procedural rule barring the second motion [the limitation on the remedy for abandonment] was an adequate state ground. This issue is practically determinative of Mr. White's habeas petition because almost all of the claims raised in the first motion, which was hastily drafted, were procedurally defaulted due to inadequate fact pleading.

White v. Bowersox, 206 F.3d at 778.

Looking back, it now appears that this view, that overcoming of the procedural rule barring the second amended motion, would be determinative of the case, may have been mistaken. [FN1] Take, for example, a claim asserted in the second amended motion, but only through incorporation of the first amended motion by reference. A holding that the second amended motion was not barred by a procedural default would open up the claims made in that motion, but if one of those claims was itself subject to a separate procedural infirmity, inadequate fact pleading, it is at least arguable that that separate difficulty should have been addressed. This, however, is not what we did. Footnote 4 of our opinion clearly so indicates:

> FN1. Our first opinion is the law of the case. As such, both the District Court and this Court are obliged to follow it in later proceedings unless we determine that the first opinion was clearly erroneous and worked a manifest injustice. *United States v. Palmer*, 297 F.3d 760, 766 (8th Cir.2002). The State does not suggest that either of these conditions exists in the present case, nor do we believe that they do.

> Our holding that consideration of the second amended petition was not barred by an adequate state procedural ground makes it unnecessary to consider the adequacy of the state pleading rules held to bar most of the claims in the first amended petition. We likewise need not consider petitioner's assertion that his actual innocence excuses any procedural default.

Id. at 780 n. 4.

We resume the narrative of the procedural history of the case. In response to our order of December 23, 1999, the pertinent parts of which have already been quoted, the parties gave us their views and supplemental briefs. The petitioner said:

> If the Court decides in Mr. White's favor on the basis of the inadequate state ground issue or the related cause and prejudice issues, it need not reach his actual innocence argument.... The reason for this is that all of these arguments are separate mechanisms for avoiding procedural default.... If the Court finds one mechanism lifts the procedural bar, it need not address the others.

Supplemental Answer and Brief of Appellant 24.

The State's response was not identical, but it was similar:

> A determination that the State's procedural rule upon which petitioner's numerous grounds for relief were defaulted--i.e., the pleading requirements under Rule 29.15(b, g)--was not independent and adequate, would not require a determination on petitioner's actual innocence claim because those claims previously deemed procedurally defaulted would be subject to review on the merits.

Supplemental Brief of Respondent 23. This response did not expressly refer to the abandonment issue, but only to pleading requirements. We understood it to mean, however, that the abandonment issue, if decided in petitioner's favor, would, in the view of the State, make determination of other procedural-bar questions unnecessary, because it was the lawyer who drafted petitioner's first amended motion who was later held to have abandoned him. 206 F.3d at 781. Even if the pleading in that motion were inadequate, therefore, it should not be held against petitioner, in our view.

All of this is by way of explaining what went on between our Court and the parties before the filing of our first opinion. When that opinion was filed, its conclusion, where one would normally look for a description of directions to be followed on remand, read as follows:

> Accordingly, we reverse in part, affirm in part, and remand to the District Court for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits.

206 F.3d at 783. The same statement, though made in somewhat different words, appears at the beginning of the opinion:

> We reverse and remand for further proceedings on the merits of those claims the District Court held to be procedurally barred.

Id. at 778. We think the purport of these expressions, especially when considered against the procedural history of the case, described earlier in this opinion, is plain. The District Court was to consider, on remand, all claims on their merits, except those claims that had previously been so considered. Our conclusion in this regard is strengthened by the fact that the

State, both in its petition for rehearing and rehearing en banc in this Court, and in its petition for certiorari filed with the Supreme Court, adopted this interpretation of our directions. We now hold that the District Court, on remand from this second appeal, should proceed accordingly. [FN2]

> FN2. There is a group of claims that need not be considered further, however. These claims, lumped together by the parties under the label of "trial error," relate to events occurring at the trial in the state courts, and represent, in each case, points that were either not preserved at the trial, or were not included in petitioner's direct appeal to the Supreme Court of Missouri. At the oral argument in the present appeal, counsel for petitioner agreed that these claims did not need to be considered on their merits. An example of such a claim appears to be claim RR, based on the theory that Mr. White's federal rights were violated when he was not present at a post-trial hearing about one of the jurors who had failed to reveal that a relative of his had been an acquaintance of one of the victims. This claim was not raised on direct appeal nor in the post-conviction proceedings. The District Court held that the claim was procedurally barred (J. A.1505, 1861). We do not understand petitioner to disagree with this holding.

II.

On remand from our first opinion, the District Court did reach the merits of three claims. We now turn to a discussion of these claims.

1. Mr. White first argues that he was deprived of the effective assistance of trial counsel during voir dire. Counsel, he says, deliberately failed to ask potential jurors any questions relating to the death penalty. He did not ask, for example, if there were jurors who would automatically impose the death penalty after

a finding of guilt of first-degree murder. Nor did counsel attempt to rehabilitate jurors who had reservations about the death penalty. In addition, petitioner argues, counsel failed to ask potential jurors about certain issues that were going to arise in the case, such as eye-witness identification, graphic photographic evidence, and children as witnesses. Voir dire is an essential part of any trial, petitioner argues, and here his lawyer was guilty of total default, a decision not to participate in voir dire at all, at least so far as questions pertaining to the death penalty were concerned.

We are urged to hold that this failure on the part of counsel was so serious that prejudice can be presumed. The normal rule, of course, is that, in order to establish ineffective assistance of counsel, a petitioner must show (1) that counsel's performance fell below what can normally be expected of a professional defender; and (2) that this defective performance caused prejudice. The term "prejudice," in turn, is defined as a reasonable probability that the outcome of the trial would have been different, and this formulation is further refined by the statement that such a reasonable probability is shown if the reviewing court, after surveying the entire record, lacks confidence in the outcome. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

We assume for present purposes that counsel's performance was seriously deficient. The lawyer states that his failure to participate in voir dire was deliberate and conscious, and that he chose not to do so because he wished to avoid focusing potential jurors' attention on the fact that this was a death-penalty case. If this was a strategic decision, it was also an unreasonable one. The decision left the field entirely to the State. The State was free, for example, to "rehabilitate" a potential juror who had appeared, in his initial answers to questions, to believe that the death penalty should automatically be imposed. The State might, for example, get such a juror to

agree that, despite his initial statement, he could and would apply fairly the court's instructions, and would impose the death penalty, if at all, only in accordance with those instructions. The process might also work the other way. That is, a juror might initially indicate doubts about the death penalty, a circumstance which might justify a challenge for cause on the part of the State. In this situation, defense counsel would normally ask further questions to reason with the juror about his expressed doubts, and try to get the juror to say that, despite any policy or emotional preferences he might have, he would apply the law fairly and impartially as given by the court in its instructions. We see no way to justify a failure on the part of defense counsel to participate in this process at all. Such a strategy did not avoid focus on the death penalty; instead, it left the State entirely free to define this focus in its own terms.

Petitioner does not contend that *Strickland* prejudice in the normal sense can be shown here. Suppose counsel had followed a proper strategy and questioned the jurors thoroughly about the death penalty and other matters. We have no idea what their answers would have been. We have no idea what rulings the trial court would have made, for example, on challenges for cause, after hearing those answers. And we have no idea how the makeup of the jury would have been changed, if at all. If, for example, voir dire by defense counsel had succeeded in rehabilitating a potential juror, and a challenge for cause by the State had thereafter been overruled, the State might still have avoided that juror by exercising one of its peremptory challenges. In short, we do not know that any person who got on the jury was prejudiced against the defendant or in favor of the death penalty, and we do not know what difference in the composition of the jury additional voir dire would have made.

Petitioner argues, however, that prejudice should be presumed. The Supreme Court has recently recognized and restated this exception to the general rule of *Strickland*:

> We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. But only in "circumstances of that magnitude" do we forego individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict.

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 1240-41, 152 L.Ed.2d 291 (2002) (internal citations omitted). The principal authority usually cited in support of this exception is *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In our view, the exception does not apply here. *Cf. Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1851-52, 152 L.Ed.2d 914 (2002) (applying *Strickland* prejudice requirement where attorney did not offer mitigating factors and waived closing argument at penalty phase). Counsel was not denied entirely, nor was the assistance of counsel denied entirely during a critical stage of the proceeding. We agree that voir dire is a critical stage, but petitioner did have counsel, and counsel proceeded on the basis of his own professional judgment, even though misguided. More importantly, we do not believe that the likelihood of prejudice is inherently so great in the present situation as to justify dispensing with the usual requirement that prejudice must be shown. Mr. White points out that his lawyer failed to ask a single question of twenty-four potential jurors who were removed for cause because they had expressed reservations about the death penalty. There is simply no way of gauging the likelihood that some of those jurors would have served on the actual trial jury if voir dire questions had been asked, nor is there any way of showing that the jurors who did actually serve were not completely fair. The Supreme Court has applied the presumption-of-prejudice exception to *Strickland* in

very few cases, most of them apparently involving active representation of conflicting interests. *Mickens, supra*, 122 S.Ct. at 1241. This is not such a case, nor, in our opinion, is there any similar reason for presuming prejudice. Accordingly, we affirm the District Court's disposition of this point on its merits.

2. Petitioner argues that his lawyer was guilty of ineffective assistance of counsel because he did not request the removal of juror Tuggle. This juror, petitioner asserts, was guilty of misconduct. It is said that other members of the jury had expressed concerns that Ms. Tuggle was not paying attention, and doubts whether she was in full possession of her faculties. A bailiff also reported that Ms. Tuggle did not seem able to follow the Court's instructions that she should not watch television news. The bailiff further reported that Ms. Tuggle expressed a desire to hurry the deliberations, and that she had discussed various matters with the jurors, including her opinion that Ted Bundy got what he deserved.

We agree completely with the District Court's disposition of this claim. The bailiff did not actually report that the juror had watched the news, and the fact that she had formed and communicated an opinion about one of the most notorious mass murderers in the country is not grounds for removal. She was discussing the case with her colleagues before final instructions were read, which was not proper, but we agree with the District Court's comments on this particular issue:

> Although she was discussing the case before final instructions were read, the Court does not believe this would have required her removal. A discussion of the case with fellow jurors after the evidence is in is the sort of "minor misconduct" that a trial court would have the discretion to decide does not warrant removal.

District Court opinion at 8. It is significant, in addition, that petitioner himself, when asked by his trial lawyer, said he wanted Ms. Tuggle to remain on the jury. If the lawyer, contrary to his client's desires, had moved to remove Ms. Tuggle, we have no reason to suppose that the motion would have been granted, or that denying it would have been error. We affirm the District Court's denial of this claim on the merits.

3. Petitioner argues that he received ineffective assistance of trial counsel because counsel failed to object to the prosecutor's allegedly improper closing argument during the penalty phase. The District Court's opinion fully discusses six particular respects in which petitioner claims the State's penalty-phase closing argument was fundamentally unfair. We have little to add to that opinion, which is comprehensive and well reasoned. District Court opinion 17-20. Take, for example, the prosecutor's argument that the jurors should impose the death penalty so that society would have retribution. There is nothing improper about this argument. The desire for retribution, while not perhaps always a commendable motivation, is a legitimate purpose of the criminal law. A prosecutor requesting the death penalty quite naturally believes that this purpose will not be accomplished if the death penalty is not imposed. There is nothing wrong with telling the jury this. The jury of course does not have to be persuaded. That is entirely its own business. We affirm on its merits the District Court's determination with respect to the conduct of trial counsel in choosing not to object to the six specific instances of allegedly improper closing argument that the District Court reached on their merits.

III.

Finally, petitioner asks that, if there is to be a remand, we direct the assignment of this case to another judge of the District Court. This argument is based upon a preliminary order

of the District Court entered after our remand. The order stated that the Court had reached a "preliminary view" as to the meaning of our mandate. This preliminary view was consistent with the view ultimately taken by the District Court, that is, that our opinion on the first appeal opened up for consideration on the merits on remand only those issues asserted in the second amended post-conviction motion. The Court's preliminary order invited the parties to express their views on the matter, in light of the Court's stated initial inclination.

Petitioner argues that the order created an "impression," Brief for Appellant 81, "that the Court had prejudged the issue of the mandate's scope ...." We disagree. People often make up their minds by degrees, and judges are no exception to this rule. There is nothing improper about a judge's sharing his or her tentative impressions or inclinations with the parties in advance of reaching a final decision. In fact, there are situations in which this can be a helpful procedure. It gives counsel on both sides a target to shoot at, so to speak, and alerts them as to the issues that they need to be addressing. In oral argument in this Court, for example, one of the judges on the panel, having read the briefs, may very well say to counsel for one side or the other that he or she had a certain tentative view of a question immediately before entering the courtroom, and may then invite counsel to inform the judge why this tentative view is wrong. Such a practice does not indicate bias at all. It simply shares with the lawyers the judge's state of mind at some point between initially picking up the briefs and coming to a final conclusion, which will occur, at the earliest, only after the oral argument and the conference.

The Supreme Court's opinion in *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), is dispositive of this point. So long as the court's expressed views come from the record of the case itself, or from representations properly made by the parties or their lawyers, nothing improper

has occurred. "Not *all* unfavorable disposition towards an individual (or his case) is properly described by [the] terms" bias or prejudice. *Id.* at 550, 114 S.Ct. 1147 (emphasis in original).

> Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Id. at 551, 114 S.Ct. 1147. Nor was there anything so extreme or emotional about the District Court's order in this case that one would be justified in inferring personal bias or favoritism. In short, we find the case for assignment to a different judge unconvincing, and we decline to make such a direction.

IV.

So much as the judgment of the District Court has rejected on their merits the three claims described in part II of this opinion is affirmed. So much of that judgment as declined to reach other claims presented on grounds of procedural bar is reversed, and the case is remanded to the District Court with the following instructions: to decide on their merits all claims alleged in the petition for writ of habeas corpus, not previously decided on their merits, except those claims falling within the group described in footnote two of this opinion.

It is so ordered.

307 F.3d 722

(Aug. 28, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	*	
	*	
Petitioner,	*	
	*	
v.	*	Case No. 97-1663-CV-W3
	*	
DON ROPER,	*	
Superintendent,	*	
	*	
Respondent.	*	

ORDER DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

On December 4, 1998, the undersigned denied Petitioner's application for a Writ of Habeas Corpus. The Order observed that "the issue of procedural default predominates over the substantive claims asserted by Petitioner," slip op. at 6, and started its legal analysis by considering the four distinct arguments Petitioner presented as grounds for overcoming the procedural bar: (1) actual innocence, (2) ineffective assistance of post-conviction counsel, (c) abandonment by post-conviction counsel, and (d) adequacy of state procedural rules. The Court concluded there was no basis for overcoming the procedural bar, then considered and rejected the merits of Petitioner's non-defaulted claims. In some instances the Court also advanced alternative holdings for the defaulted claims, concluding they lacked merit.

The Eighth Circuit reversed, holding that certain state procedural rules were inadequate to constitute a procedural bar.

White v. Bowersox, 206 F.3d 776 (8th Cir.), cert. denied, 121 S. Ct. 275 (2000). The parties have supplied the supplement briefing requested by this Court, and after considering those briefs and the record the Court denies Petitioner's application for a Writ of Habeas Corpus.

I. SCOPE OF REMAND

The scope of remand is in serious dispute. The Eighth Circuit's opinion focused on the Missouri Supreme Court's determination that claims raised in the Second Amended 29.15 Motion were not to be considered because state rules did not permit a second amended motion to be filed. In its October 3, 2000 Order directing the parties to provide supplemental briefing, this Court declared that "the undersigned originally observed that a number of Petitioner's defaulted claims had not been raised in the second amended Rule 29.15 motion; thus, those claims appeared to be defaulted even if the claims raised in the second amended Rule 29.15 motion could be considered (as will happen now in light of the Eighth Circuit's decision). In other words, even though claims contained in the second amended Rule 29.15 motion can now be considered, not all of the claims previously adjudged to be defaulted were contained in the second amended motion."

This statement was made without knowledge this issue had been the subject of some dispute before the Court of Appeals in the form of various post-decision briefings. However, although both parties argued about the scope of remand, neither one has identified an order from that court specifically addressing those arguments.

"The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority, i.e., the district court. The District Court is bound by the [appellate] decree and must carry it into

execution. On remand, the district court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in light of the opinion of [the appellate] court deciding the case." Pearson v. Norris, 94 F.3d 406, 409 (8th Cir. 1996) (internal citations and quotations omitted). Here, the Eighth Circuit described its decision as "hold[ing] that the state procedural rule that barred Mr. White's second amended motion was inadequate to bar federal consideration of *these* claims." White, 206 F.3d at 778 (emphasis added). In the concluding portions of the discussion on this point, the court declared that "the new principles announced by the Missouri Supreme Court in [Petitioner's] case were not available to guide him. . . . Because these principles were neither readily ascertainable nor firmly established, *the procedural default that ensued* cannot be considered an adequate state ground to bar federal review." Id. at 782 (emphasis supplied). The court's holding is not so broad (or at least is not clearly so broad) to declare that *all* grounds for procedural default were invalid. This observation is particularly important in this case for two reasons. First, some claims involved trial errors that were defaulted at trial or on direct appeal. Those claims were defaulted before any 29.15 motion was filed, and the default could not be cured by including such issues in the Second Amended 29.15 Motion. Second, some issues Petitioner advances in this forum were not included in his Second Amended 29.15 Motion. Thus, even though the state rule barring a second amended petition could not provide the basis for a procedural default, these claims were defaulted because they were not included in the second amended petition and thus were never presented to the state courts. The fact that claims in the Second Amended 29.15 Motion can now be considered will not cure the failure to present a particular claim at any stage of the state court proceedings. This conclusion does not violate the spirit of the appellate court's holding, which was limited to consideration of a single argument regarding procedural default. A single claim can be defaulted for a variety of reasons, and the

fact that one such reason is removed does not mean that all are removed. Put another way, Petitioner was required to give the state courts a "fair" opportunity to consider his claims. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999); but even if one considers Petitioner's attempt to present claim included in the Second Amended 29.15 Motion there remain some claims that Petitioner gave the state courts no opportunity to consider. Those claims were, and remain, defaulted.

Petitioner focuses upon the Eighth Circuit's directive that the case was "remand[ed] to the District Court for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits," id. at 782, and compares it favorable to the instruction in Pearson that the court on remand "consider the merits of [the petitioner's] claims." Pearson, 94 F.3d at 409. On remand, the district court concluded the claims were defaulted, but on the subsequent appeal the Eighth Circuit referenced the language of the remand and held that the district court "had no power on remand to address any issues other than the merits of Mr. Pearson's sixth amendment claims relative to ineffective assistance at trial." Id. at 410. From this, Petitioner concludes that all claims previously held to be defaulted - - regardless of the reasons for that conclusion - - are to be considered. Respondent draws a distinction between the two orders in that Pearson involved specific instructions to consider the merits, whereas here this Court was instructed to consider Petitioner's "constitutional claims" – and such consideration can result in a conclusion that they are defaulted for reasons other than those specifically addressed by the Eighth Circuit.

The Court believes that its preliminary view remains correct. For that reason, the Court holds that all claims held to be defaulted for reasons other than the one reversed by the Eighth Circuit are still defaulted. In the interest of brevity, the Court incorporates the discussion from Parts II(A) (actual

innocence not grounds for excusing default). II(B) (ineffective assistance of post-conviction counsel not grounds for excusing default), and II(D) (violation of state pleading requirements adequate grounds for finding default) of the December 4, 1998 Order herein as set forth verbatim.

II. DISCUSSION

The Court will consider the issues Petitioner has raised in the same order and with the same headings as they were discussed in the December 4, 1998 Order.

A. Ineffective Assistance of Trial Counsel: Voir Dire, Part I

Petitioner contends that his trial counsel was ineffective based on his performance during voir dire. In summary, Petitioner complains that trial counsel allowed the prosecutor to "completely dominate the voir dire" and asked very few questions. As a result, trial counsel allegedly missed opportunities to (1) ferret out grounds for challenging jurors for cause or to rehabilitate them in the face of the prosecutor's challenges and (2) educate the jury about the death penalty and Petitioner's theory of defense. Petitioner does not contend that his jury was biased; instead, he argues that he was prejudiced because the jury that decided his case was "prosecution oriented."

One aspect of this claim was considered and rejected on the merits on the December 4, 1998 Order; specifically, Petitioner's claim that trial counsel was ineffective for failing to rehabilitate Venireman Danny Robertson. There appears little doubt that the Eighth Circuit remand order does not require reconsideration of "those claims that the District Court has already addressed on the merits," White, 206 F.3d at 783, so there is no need to address this issue further.

The remaining aspects of this claim lack merit. As the Court indicated in the December 4, 1998 Order.

> the record demonstrates that trial counsel's decision was the product of a conscious decision to avoid overemphasizing the fact that this was a death penalty case. T.Tr. at 7. Petitioner ridicules this tactic, but it is not so absurd as to violate trial counsel's constitutional obligation to provide effective assistance at trial. Furthermore, Petitioner is unable to demonstrate that the composition of his jury would have been any different had trial counsel acted differently. Cf. Kilgore v. Bowersox, 124 F.3d 985, 994 (8th Cir. 1997), cert. denied, 118 S. Ct. 2352 (1998).

Slip op. at 26 n.14. It is this latter point that is most crucial in this context. It must be remembered that Petitioner does not allege that his Sixth Amendment right to a fair and impartial jury was violated, and he does not allege that any of the jurors on the panel should have been struck for cause. Petitioner speculates that his jury was "pro-prosecution," and that further voir dire would have ferreted out this bias. He also speculates that additional questions would have permitted some jurors to be struck for cause.

The Court's ruling is the same as with respect to Venireman Danny Robertson. Petitioner does not challenge the fact that the record provided ample support for removing these jurors for cause, nor does he suggest exactly what he could do to after their opinions. All of the jurors declared that there were no circumstances under which they could vote for the death penalty, and most further declared that they would automatically vote for life imprisonment without parole. The Court is at a loss to understand exactly what trial counsel could have done to cause these potential jurors to retreat from these beliefs.

B. Informing Jurors About the Governor's Power to Pardon

This issue was addressed and denied on the merits in the December 4, 1998 Order, so there is no need to consider it anew.

C. Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection

This claim was also rejected on the merits, so further discussion is not required.

D. Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror

After the Petitioner rested his case in chief, but before final instructions were read, the bailiff brought a matter involving one of the jurors (Ruth Tuggle) to the trial court's attention. The bailiff related her observations in open court with Petitioner (but not the jury) present:

> The juror, Mrs. Tuggle, has expressed her desire to hurry the deliberation. She's asked twice at least in the past 24 hours whether it lasts very long. She several times has discussed murders and brought up the case about Ted Bundy being murdered, and he deserved what he got.
>
> There's some concern as to whether she's really paying attention. She doesn't seem quite with it. The other jurors also feel that maybe she's not, or it's hard communicating with her.
>
> I've told her the rules of being a sequestered juror, watching TV news, what program[s] she can or can't

> watch, and she just doesn't see[m] to be able to follow those instructions.

T.Tr. at 1026. Petitioner's counsel then asked Petitioner whether it was his desire to keep Tuggle on the jury, and he declared it was. T.Tr. at 1026.

Petitioner now contends that his attorney was constitutionally ineffective for failing to seek Tuggle's removal. This claim of ineffective assistance was not presented in either his pro se 29.15 Motion or the First Amended 29.15 Motion, nor was it raised on appeal to the Missouri Supreme Court. It was raised in the Second Amended 29.15 Motion, where the claim was described as follows:

> Defense counsel failed to move to strike Juror No. 58, Ruth Tuggle, once it became apparent that Juror Tuggle had violated the court's order to not discuss the case among the other jurors or follow instructions given by the bailiff in the case (TR. 1026).

Second Amended 29.15 Motion at 7 (Legal File at 41).

The Amended Petition in this case focuses on Juror Tuggle's "desire to hurry the deliberations," her discussion of "various other murders with other jurors and specifically. . .the case of Ted Bundy and his execution," the concern among jurors as to whether Ms. Tuggle was paying attention, and whether she was in full possession of her mental faculties," and the bailiff's concern that she "doesn't seem to be able to follow . . . instructions." Amended Petition, ¶¶ 77-79. At no time, in either the Second Amended 29.15 Motion or the Amended Petition, did Petitioner suggest that counsel should have sought Juror Tuggle's removal because she was biased, or that trial counsel rejected the trial judge's invitation to remove her. On remand, Petitioner now contends that counsel was ineffective

for (1) failing to accept the trial court's offer to remove Juror Tuggle, and (2) failing to seek removal of Juror Tuggle because she was biased. The Court rejects all argument that have been raised.

The claim that counsel refused to accept the trial court's invitation to excuse Juror Tuggle was defaulted. Even if one considers the argument raised in the Second Amended 29.15 Motion, this argument was not presented to the state courts. In addition, the claim was not presented in the Amended Petition in this case; whatever, the scope of remand may be, it does not permit Petitioner to add new claims. Finally, and most importantly, the argument relies on a faulty premise - the transcript does not reveal that the trial judge would have excused her if Petitioner made the request. Review of the transcript reveals that the matter had been discussed between the attorneys for both sides and between Petitioner and his attorney, and a plan of action mapped out, before the record was made. Tr. at 1025, lines 1-18. Clearly, a decision had been reached before the judge was summoned. Petitioner was asked, by his trial attorney and not the judge, "is it your decision to keep her on the jury?" Petitioner answered in the affirmative. Tr. at 1026. At no time did the judge declare that he would remove Juror Tuggle if asked, so counsel could not have been ineffective for failing to accept the offer.

The claim that counsel should have argued Juror Tuggle was biased was also procedurally defaulted because it was not included in the Second Amended Petition. It also was not advanced in the Amended Petition in this case. Moreover, the Court does not believe that Juror Tuggle was removable for this reason. The outcome might be different had she expressed these views before trial, but she made these statements after Petitioner rested.

Finally, the Court holds that the trial court was not obligated to remove Juror Tuggle for misconduct. The bailiff did not report that Ms. Tuggle was watching the news or reading the newspapers, and the fact that she knew about the fate of one of the most notorious serial murderers in this country is not grounds for her removal. Although she was discussing the case before final instructions were read, the Court does not believe this would have required her removal. A discussion of the case with fellow jurors after the evidence is in the sort of "minor misconduct" that a trial court would have the discretion to decide does not warrant removal.

E. Right to Fair and Impartial Jury

Relying on the circumstances discussed in Part II.D, Petitioner contends that allowing Tuggle to remain on the jury violated his right to a fair and impartial jury. Tuggle's inclusion on the jury was not objected to at trial and was not raised on direct appeal and therefore has been defaulted, and the Eighth Circuit's remand does not affect this conclusion. Petitioner cannot rely on his attorney's failure to object as cause and prejudice to excuse this default because, as discussed in Part II.D, Petitioner did not present the state courts with a claim that his attorney should have alleged juror bias. See Oxford v. Delo, 59 F.3d 741, 747 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996) ("the performance of trial counsel is irrelevant to the cause [and prejudice] inquiry where the petitioner fails to raise the ineffective assistance of trial counsel claim in state court proceedings."). Moreover, as discussed in the previous section, the record demonstrates that Juror Tuggle became "biased against Petitioner" after she heard of all the evidence; this is not a constitutional violation.

F. Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause

The merits of this issue were addressed in the December 4, 1998 Order and were affirmed on appeal. White, 206 F.3d at 781-82. Further discussion is not required.

G. Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror

During the small-group voir dire, Venirewoman Brison (who was number 33 on the panel) discussed her concerns and hesitations about voting in favor of the death penalty. T.Tr. at 276-77, 284. The prosecutor's motion to strike her for cause was denied. T.Tr. at 289-91. Petitioner contends that the prosecutor "slipped" her onto a list of jurors who had been removed for cause, and his trial counsel's failure to remedy this error constituted ineffective assistance of counsel.

This claim of ineffective assistance was not presented in the Second Amended 29.15 motion (as observed in the December 4, 1998 Order at 33 n.16) and for that reason remains defaulted notwithstanding the Eight Circuit's decision. The December 4, 1998 Order includes an alternative holding, rejecting the claim on the merits. The scope of remand does not require the Court to revisit issues that were addressed on the merits, and for that additional reason the Court concludes that further discussion is not warranted.

H. Ineffective Assistance of Trial Counsel: Voir Dire, Part II

Petitioner contends that during the death penalty portion of voir dire, his trial counsel "did not conduct any questioning about jurors' views on the death penalty. He did not ask if there were jurors who would automatically impose the death penalty. He did not attempt to rehabilitate jurors who had reservations about the death penalty." Petitioner's Supplemental Brief on Remand at 65. The prosecutor asked the prospective jurors

whether they could "realistically consider" both punishments, which elicited the jurors' views on the subject. The prosecutor followed up with additional questions when appropriate, including particularly whenever an answer indicated inability to consider both punishments. The Court does not discern (and Petitioner does not identify) any prejudice from trial counsel's failure to follow up with a virtually identical question. Petitioner's argument regarding the failure to attempt rehabilitation is the same argument advanced in Part II.E and is rejected for the same reason.

Petitioner also faults trial counsel for failing to "ask jurors any questions about issues that were going to arise in the case such as witness identification and misidentification, graphic photographic evidence, children as victims and witnesses, and drug use." Id. Questions designed to elicit views about drug use were asked during general voir dire. Tr. at 52-71. The issue was also discussed during individual voir dire. Petitioner does not suggest what more trial counsel should have done, nor does he explain how the failure to do more resulted in prejudice. There could be no deficient performance under Strickland for failure to discuss children as victims because none of the three victims were children; the children were witnesses. With respect to the remaining issues, even if one assumes the failure to raise these topics in voir dire constituted deficient performance, Petitioner's claim of prejudice is purely speculative.

I. Ineffective Assistance of Trial Counsel:
Failure to Investigate and Introduce Evidence of Innocence

This claim was procedurally defaulted. The issue is not raised in the Second Amended 29.15 Motion. Some, but not all, aspects of this claim were raised in the First Amended 29.15 Motion; those that were not have never been presented to the Missouri courts and for that reason are defaulted. Those that

were presented in the First Amended 29.15 Motion were addressed by the trial court, but were not raised on appeal to the Missouri Supreme Court. see Respondent's Exhibits F. S. and CC (Petitioner's Briefs filed with the Missouri Supreme Court) and for that reason those claims were defaulted. See generally O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

J. Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence

This claim was not presented to the state courts at any time, including in the Second Amended 29.15 Motion. The claim has been defaulted.

K. Eighth Amendment Violation: Lack of Mitigating Evidence

This claim was not included in the Second Amended 29.15 motion and was procedurally defaulted. In addition, the Court's December 4, 1998 Order included an alternative holding on the merits, and the mandate does not direct this Court to reconsider issues previously addressed on the merits. For both of these reasons, further discussion is not warranted.

L. Trial Counsel's Conflict of Interest

The merits of this issue were addressed in the December 4, 1998 Order and were affirmed on appeal. White, 206 F.3d at 782-83. Further discussion is not required.

M. Ineffectiveness of Appellate Counsel: Myriad of Claims

The Court's December 4, 1998 Order rejected this claim on the merits, holding that the claim was not cognizable. Further discussion is not required.

N. Due Process Violation: Abandonment by Post-Conviction Counsel

This issue was disposed of on the merits in the December 4. 1998 Order, so further discussion is not required.

O. Due Process: Pleadings Requirements

This issue focused primarily on the Missouri Supreme Court's determination that his First Amended 29.15 Motion was insufficient under state law to secure him a hearing. The December 4, 1998 Order addressed the merits (by incorporating the earlier discussion in Part II.D of that Order), so further discussion is not required.

P. Due Process: Rule 29.15's Deadlines

This claim was previously rejected on the merits.

Q. Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams

This issue was not raised in the Second Amended 29.15 Motion or at any other time in the Missouri Courts, so it remains defaulted. In addition, the December 4, 1998 Order observed that the claim lacked merit because Williams' affidavit indicated she had spoken to trial counsel. For both of these reasons, further discussions are not warranted.

R. Ineffective Assistance of Trial Counsel: Failure to Give an Opening Statement at the Beginning of Trial

This claim was not presented to the state courts at any time, including in the Second Amended 29.15 Motion, and for that reason has been defaulted. In any event, the Court holds that

whether opening statement should be made at the beginning of trial or immediately before the defendant presents his case in chief is a classic example of a strategic decision that cannot be second-guessed under Strickland.

S. Ineffective Assistance of Trial Counsel: Failure to Hire an Expert

Petitioner contends his trial counsel was ineffective for failing to hire an expert to testify that those who use crack cocaine - such as Kinney and Black - suffer damage to their ability to perceive and remember events. The issue was raised in Petitioner's pro se 29.15 Motion (as Ground S), but was not raised in either the First Amended 29.15 Motion or the Second Amended 29.15 Motion. The Missouri Supreme Court held that the claim was not properly pleaded and that Petitioner did not establish what the expert's testimony would have been. White v. State, 939 S.W.2d 887, 898 (Mo.) (en banc), cert. denied 522 U.S. 948 (1997); see also Judgment dated August 30, 1995, at 3 (trial court's rejection of this issue).

In Part II.D of the December 4, 1998 Order, the Court held that violation of Missouri's pleading rules constituted a procedural requirement, and claims dismissed for failure to obey those rules were defaulted. The Eight Circuit declared that its holding "makes it unnecessary to consider the adequacy of the state pleading rules held to bar most of the claims in the first amended petition." White, 206 F.3d at 780 n.4. The state pleading rules are relevant to this issue because this issue was not raised in the Second Amended 29.15 Motion that the Court of Appeals has instructed the Court to consider. The only place it is raised is in the pro se motion, and there it is raised in a manner that does not comply with the state pleading rules. The Court incorporates its discussion from Part II.D of the December 4, 1998 Order and reaffirms its conclusion that the claim has been defaulted.

T. Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances

The Court held this issue to be defaulted and, as an alternative holding, rejected the claim on the merits. Consequently, this claim does not need to be re-examined on remand.

U. Ineffective Assistance of Trial Counsel: Failure to Object to the Videotaped Lineup

In this claim, Petitioner contends he was in jail awaiting trial on an unrelated robbery charge when he was placed in a videotaped lineup. He alleges that his attorney in the robbery case was not contacted prior to the lineup, and his trial counsel in this case was ineffective for failing to object to the use of the lineup for this reason. This claim was not presented to the state courts in any pleading (including the Second Amended 29.15 Motion) and remains defaulted; in addition, the Court incorporated the subsequent discussion in Part IV.Z and noted that the claim lacked merit because Moore v. Illinois, 434 U.S. 220, 224, 227 (1977) does not require the presence of counsel when a person is shown in a videotaped lineup. This issue need not be discussed further for the independent reasons that (1) the claim was defaulted, and the Eighth Circuit's decision does not alter that conclusion, and (2) this Court previously addressed the merits, and the Eighth Circuit declared that issues previously addressed on the merits need not be addressed again.

V. Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson

This claim was not included in the Second Amended 29.15 Motion (or in any other pleading filed in state court), and for that reason has been defaulted.

W. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Use of Peremptory Challenges and Certain Strikes for Cause

Petitioner contends that the prosecutor utilized peremptory challenges to eliminate five jurors who had "conscientious scruples" against the death penalty and six jurors who expressed difficulty believing witnesses who used illegal drugs. He also claims that his trial counsel failed to object to two of the prosecutor's requests to strike jurors for cause.

The first aspect of this claim was addressed on the merits when the Court held that it was barred by Teague v. Lane, 489 U.S. 288, 316 (1989). The second aspect is clearly lacking in merit. Venireman Heman agreed that he did not know if he "could be fair to both the State and the defendant" because of his views regarding drugs. Tr. at 333. There is no indication as to what counsel should have done, and agreeing to strike Mr. Heman for cause was reasonable given that the murder was related to a drug transaction and the jurors would be assessing the penalty if Petitioner was found guilty. In addition to her views about drugs, Venirewoman Meysenburg declared that she did "not take stress very well" and was suffering from a migraine headache after just one day of the jury selection process. Tr. at 370-71. She also revealed that she would "probably" vote automatically for life without parole if Defendant were found guilty. Tr. at 369. It is not clear whether the basis for the strike for cause was Ms. Meysenburg's views regarding drugs, her inability to consider the death penalty, or her health, Tr. at 384; regardless, the record reveals that the strike for cause was appropriate so failing to object was not ineffective assistance.

X. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Closing Argument During Penalty Phase

Petitioner argues that various aspects of the prosecutor's closing argument during the penalty phase were improper, and trial counsel was ineffective for failing to object. This claim was raised in the First Amended 29.15 Motion, where trial counsel was described as failing "to object to all aspects of the State's penalty phase argument since at no time was the argument directed to those aspects of this crime or this Movant which would justify a sentence of death." First Amended 29.15 Motion, ¶2(J) (emphasis in original). The Missouri Supreme Court held the claim was defaulted because it was not pleaded with sufficient particularly. White, 939 S.W.2d at 902.

The Second Amended 29.15 Motion contains greater particularly, identifying six specific statements from the prosecutor's argument that he alleged to be improper. Second Amended 29.15 Motion ¶2(u). In this Amended Petition in this Court, Petitioner identified a total of ten allegedly improper comments. Those comments that were not presented in the Second Amended 29.15 Motion were not brought to the state courts' attention at any time, and for that reason cannot form the basis for relief.

"The test for prosecutorial misconduct has two parts. First, the remarks must have been improper, and second, the remarks must have been so prejudicial as to deprive the defendant of a fair trial." Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998), cert. denied, 528 U.S. 880 (1999). Needless to say, if the remarks were not improper, there is no unfair prejudice to be gauged and the second component of the analysis is unnecessary. However, in the event an improper comment is revealed, it must be remembered that the standard of prejudice is relatively high. "The petitioner must show that the alleged improprieties were 'so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair.' Moore v. Wyrick, 760 F.2d 884, 886 (8th Cir. 1985). Under this

standard, a petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial - - e.e., that absent the alleged impropriety, the verdict probably would have been different." Newton v. Armontrout, 885 F.2d 1328, 1336-37 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990) (second quotation omitted); see also Darden v. Wainright, 477U.S. 168, 181 (1986). In evaluating the potential for prejudice, the Court must consider "(1) the type of prejudice that arose from the remark; (2) whether defense counsel did anything in his argument to minimize the prejudice; (3) whether the jury was properly instructed; and (4) whether there is a reasonable probability that the outcome of the [proceeding] would have been different ..." Young 161 F.3d at 1162. With regard to the third element, the fact that the jury was generally instructed that arguments of counsel are not evidence is insufficient to thwart a showing of prejudice. E.g., Antwine v. Delo, 54 F.3d 1357, 1364 (8th Cir. 1995), cert. denied, 516 U.S. 1067 (1996); Newlon, 885 F.2d at 1337. With these dictates in mind, the alleged instances of misconduct presented in the Second Amended Rule 29.15 Motion can be considered.

1. In broaching this theory that Don Wright was killed as part of an effort to eliminate witness, the prosecutor said

> "[f]or the first time we get to explain to [Petitioner] and show him that he's left us with no choice. There's only one punishment, and that's that the pay the ultimate penalty for this ultimate crime. Leamon White must be sentenced to death.

Supplemental Tr. at 35. In context, this statement does not declare that the jury must vote to impose the death penalty, but rather legitimately expresses the prosecutor's view that the penalty should be imposed because Wright was killed to prevent any witnesses from identifying Petitioner.

2. While explaining the need for the jury to consider the existence of aggravating factors, the prosecutor said

> During voir dire, because you hadn't heard the evidence, because we can't talk about what's going to go on in this stage, I couldn't tell you, "You're going to find him guilty," and because of the nature of this case aggravating circumstances are automatic. But you have to find them. And your jury foremen will have to write out the exact language that is contained in these instructions.

Id. at 36. Petitioner contends that this statement "impl[ied] that if the jury found any aggravating circumstance, they had to impose death." Amended Petitioner, ¶ 212(b). This is not a proper characterization of the statement. Considering the text, the message conveyed is that in finding Petitioner guilty of first degree murder and thereby agreeing with the prosecutor's theory of the case, they had already essentially found some of the aggravating factors to exist. The statement could also be understood as referring to the aggravating circumstance based on Petitioner's prior convictions; a finding on this point, given the nature of the evidence, could also be characterized as "automatic." Regardless, the topic being discussed is the existence of aggravating circumstances, and the statement does not suggest that the imposition of the death penalty itself is automatic.

3. The prosecutor argued that the jury could consider the deterrent effect of the death penalty. Petitioner has not explained why this argument is improper, and at least three Courts of appeal have held the argument is not improper. Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir.), cert. denied, 502 U.S. 898 (1991); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986), cert. denied, 482 U.S. 909 (1987); Drake v. Kemp,

762 F.2d 1449, 1458 (11th Cir. 1985) (en banc), cert denied, 478 U.S. 1020 (1986).

4. In an argument similar to the preceding one, Petitioner faults the prosecutor for arguing that the death penalty serves as retribution. The allegation of error is rejected for the reasons previously expressed.

5. The prosecutor asked the jury to consider the gruesomeness of the crime. Supplemental Tr. at 42, 44. This argument was not improper because one of the statutory aggravating factors submitted for the jury's consideration was whether the murder was "outrageously or wantonly vile, horrible, or inhumane." All the prosecutor did was ask the jury to consider the available evidence on this issue.

6. In the rebuttal portion of the closing argument, the prosecutor told the jury that "anybody along the way, if they don't do their job, then Leamon White wins." Supplemental Tr. at 45. Petitioner argues that this statement "lessened the jurors' sense of responsibility for imposition of the death penalty," Amended Petition, ¶ 212(l), but does not explain this assertion. The Court holds the comment is too nebulous to have much impact, and it is certainly to insubstantial to have resulted in any prejudice.

Y. Ineffective Assistance of Appellate counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver

This claim was disposed of on the merits in the December 4, 1998 Order, so further discussions is not required.

Z. Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's In-Court Identification of Petitioner

This claim was disposed of on the merits in the December 4, 1998 Order, so further discussion is not required.

AA. Actual Innocence

In this claim, Petitioner argued that this actual innocence of the crime justified issuance of the writ. The claim was considered and rejected on the merits, so re-examination on remand is not appropriate.

BB. Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer

This claim was never presented to the state courts in any form, so it has been, and remains, procedurally defaulted.

CC. Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel

This claim was not presented in the Second Amended 29.15 Motion. In addition the December 4, 1998 includes an alternative holding, rejecting the claim on the merits. For these reasons, the claim is rejected.

DD. Judicial Bias During Post-Conviction Proceedings, Part I

This Court's rejection of the issue was affirmed by the Eighth Circuit. White, 206 F.3d at 783.

EE. Judicial Bias During Trial

This claim of trial error was not raised on direct appeal to the Missouri Supreme Court and thereby was procedurally defaulted. The default could not be excused even if the claim

was included in the Second Amended Rule 29.15 Motion – which it was not. This claim has been defaulted, and there is no basis for excusing the default.

FF. Judicial Bias During Post-Conviction Proceedings, Part II

This argument was disposed of on the merits in the December 4, 1998 Order. In addition, the issue is very similar to the one discussed in Part II.DD herein (Part IV.DD in the December 4, 1998 Order), and the ruling on that issues was affirmed on appeal.

GG. Ineffective Assistance of Trial Counsel: "Bad Loser" Comment

The December 4, 1998 Order includes an alternative holding, rejecting this claim on the merits because the jurors who heard the comment were not on the jury and their jury numbers were too high to provide them with a chance to be on the panel; thus, no peremptory challenges were lost. Further discussion is not warranted.

HH. Ineffective Assistance of Post-Conviction Counsel, Part II

This claim was rejected on the merits in the December 4, 1998 Order.

II. Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims

This claim was disposed of on the merits.

JJ. Ineffectiveness of Trial Counsel:

Failure to Request Mistrial During Prosecutor's Closing Argument

This claim was not presented in any of the three post-conviction motions filed by Petitioner or on his behalf – including the Second Amended 29.15 Motion. The claim has been defaulted.

KK. Ineffective Assistance of Appellate Counsel: Failure to Raise Claim Based on *Brady v. Maryland*

This claim was addressed on the merits in the December 4, 1998 Order, so further discussion is not required.

LL. Ineffective Assistance of Appellate Counsel: Verdict Director

This claim was addressed on the merits in the December 4, 1998 Order, so further discussion is not required.

MM. Ineffective Assistance of Post-Conviction Counsel, Part III

This claim was addressed on the merits in the December 4, 1998 Order, so further discussion is not required.

NN. Ineffective Assistance of Trial Counsel: Former Prosecutor as Defense Attorney

Petitioner contends that one of his attorneys (John O'Connor) was Trial Director for the Jackson County Prosecutor's Office when Wright's murder was being investigated and when the indictment in this case was filed. He also speculates that O'Connor "reviewed the case and assigned it to Mr. Hall and Mr. Peters for trial. He also may have been involved in the decision to seek the death penalty." Prior to

jury selection. Duncan asked Petitioner if he understood that O'Connor would be assisting in the case. He also indicated his understanding that O'Connor "until about a year ago was in the Prosecuting Attorney's Office" but that he had not reviewed Petitioner's case during his employment as a prosecutor. T.Tr. at 4-5. Petitioner now contends that O'Connor's status as a former prosecutor constituted ineffective assistance of counsel.

This claim is procedurally defaulted because it was not presented in any of the post-conviction motions. In addition, the portions of the record cited above demonstrate the claim is meritless; O'Connor had no prior involvement with the case, and his prior work for the prosecutor's office does not, in and of itself, constitute ineffective assistance of counsel.

OO. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Opening Statement

This claim was rejected on the merits, so the remand doe not require reconsideration.

PP. Proportionality Review

This claim was rejected on the merits.

QQ. Ineffective Assistance of Trial Counsel: Wasting a Peremptory Strike

Petitioner contends that his trial counsel provided ineffective assistance when he "wasted" a peremptory strike on a prospective juror that had already been struck. This claim was raised in the pro se 29.15 Motion. Pro se 29.15 ¶ 8 (L). The Missouri Supreme Court rejected the claim because Petitioner failed to allege how he had been prejudiced, White III, 939 S.W.2d at 900, which constitutes a procedural default. The issue is raised in the Second Amended 29.15 Motion in

paragraph 2(k), but the infirmity previously identified by the Supreme Court is not corrected therein.

Ultimately, it does not matter whether the claim is still procedurally defaulted because the December 4, 1998 Order includes a detailed discussion of the record and concludes that the juror in question was not going to be struck for cause. This merit-based decision provides and adequate basis for rejecting the claim.

RR. Right to Be Present at Critical Stages

Following his conviction, on March 2, 1989 Petitioner filed a Supplemental Motion for New Trial alleging that one of the jurors (Timothy Williams) "failed to reveal on voir dire examination... that his brother or other relative was a friend of and had gone to school with the victim, Don Wright." Direct Appeal Legal File at 39. A hearing was held on March 1,[23] but Petitioner did not attend the proceeding. The record contained no reason for his absence. The Motion (along with other post-trial motions) was denied on April 14, 1989.

Petitioner did not raise this issue in his initial appeal. He raised the issue for the first time in his brief in the third appeal to the Missouri Supreme Court. Keeping in mind that Petitioner's direct appeal was disposed of in an earlier appeal,[24] the court observed that "[p]lain error review may be considered 'on appeal.' Rule 84.13(c). This is not an appeal of White's conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the

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[23]There is no explanation as to how the motion was filed the day after the hearing; however, there is no denying the dates as they appear in the legal file and on the Transcript.

[24]The reader is referred to Part I.B of the December 4, 1998 Order for a more-complete description of this case's odyssey through the state courts.

post-conviction court 'clearly erred' in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible." White III, 939 S.W.2d at 904.[25] Consequently, the claim has been procedurally defaulted.

SS. Ineffective Assistance of Trial Counsel: Myriad of Claims

Within this single claim, Petitioner asserts several claims of ineffective assistance of trial counsel. He contends his attorney was ineffective for (1) failing to elicit helpful testimony from Ben Kinney, (2) failing to challenge suggestive pretrial identification procedures, (3) failing to effectively impeach Ernest Black and Carol Kinney, (4) failing to prepare for trial, and (5) eliciting a positive identification of Petitioner from Ernest Black. The Missouri Supreme Court held that Petitioner failed to satisfy the state court's pleading requirements for proper presentation of the first four claims, see White, 939 S.W.2d at 895-97, so they were deemed defaulted. The fifth claim was addressed by this Court on the merits in the December 4, 1998 Order, so further discussion is not required.

The Second Amended 29.15 Motion does not mention the claim regarding Ben Kinney or the impeachment of Ernest Black and Carol Kinney, so consideration of that pleading cannot cure the procedural default previously identified by the Missouri Supreme Court. That court also found that the record demonstrated no prejudice from the manner in which the cross examination of the latter two witnesses was conducted because Petitioner "provide[d] no factual basis for a finding of either

[25]The Missouri Supreme Court also "assume[d] that the issue is raised as a motion to recall the mandate" and considered whether appellate counsel provided ineffective assistance for failing to raise the issue. White III, 939 S.W.2d at 904. Petitioner has not raised this issue in this forum, so there is no need to address it.

inadequate representation or prejudice under the *Strickland* test." Id. at 897. The claim was also rejected on the merits because "the record refutes [Petitioner's] claim that his attorneys failed to impeach Carol Kinney and Ernest Black with prior inconsistent statements." Id. at 895-96, 898. These factual findings are entitled to deference, and Petitioner has not satisfied the heavy burden required to justify interposing this Court's judgment for that of the state courts.

This leaves only the issue regarding the pretrial identification. Unlike the other claims, this one is discussed in detail in the Second Amended 29.15 Motion. See paragraph 2(l) – but only as it relates to Ernest Black's identification.[26] The Court holds that it provides sufficient detail to have permitted meaningful consideration by the Missouri courts, but the claim is rejected for two reasons.

First, Petitioner has not pursued this claim on remand. This issue is raised, along with several others, in Claim 45 of the Amended Petition. Claim 45 is addressed in Part III.A of Petitioner's Supplemental Brief on issues to be Considered on Remand. However, this aspect of Claim 45 is not raised.

Second, it lacks merit. In September 1987, Black was shown approximately four videotaped lineups; he failed to make a positive identification. Tr. at 880. The weekend before trial – approximately sixteen months later – Black was shown two of those same lineups. Tr. at 880-81. Petitioner' s

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[26]The Amended Petition filed in this Court also discusses an identification made by Carol Kinney. This claim was not raised in the Second Amended 29.15 Motion, nor was it presented to the state courts at any other time. In any event, the Court previously observed that the factual predicate for this claim is not present. See December 4, 1998 Order at 15 ("Detective Gibson had not shown Kinney Petitioner's picture, T.Tr. at 759, 782-83 - in fact, up to this point in time he did not even know that the police *had* Petitioner's picture. T.Tr. at 771-72.").

attorneys were not contacted prior to the January 1989 viewing, nor were they present for it. The next Monday – the day trial started – one of Petitioner's attorneys was told that Black had identified the third man in the lineup as the second man at Kinney's house, but counsel misinterpreted the information to mean that Black had identified the third man at Kinney's house. The third man at Kinney's house was fairly well established as being Cleveland Ford. When counsel's misunderstanding came to light on the Saturday of trial[27] Petitioner's counsel objected on the basis of the lateness of the disclosure, but the trial court held that the objection was untimely. Tr. at 881-86. Black denied receiving any information about the individuals in the videotapes prior to viewing them in January 1989. Tr. at 886. He also denied remembering whether the videotapes he saw immediately before trial were shown to him in September 1987. Tr. at 954.

The Second Amended 29.15 Motion raises five specific arguments regarding Black's pretrial identification, and these are the only issues that are not procedurally defaulted:

1. The identification was sought too close in time to trial to permit timely disclosure to Petitioner's attorneys,
2. The late notice prejudiced the trial strategy,
3. The lineup was suggestive because it "was conducted two years after the crime and after Mr. Black had seen photographs and previous lineups of the defendant without making any identification,"
4. The lineup was administered after Petitioner was indicted, but Petitioner's attorneys were not contacted in violation of the Sixth Amendment, and
5. The prosecution did not clearly identify the substance of Black's identification on the Monday of trial.

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[27]This is not a misprint; the transcript reflects that trial proceedings occurred on February 4, 1989, which was a Saturday.

These objections are not meritorious, so counsel was not ineffective for failing to make them. Petitioner cites no legal grounds for supporting the first two. The passage of time between an event and a pretrial identification does not demonstrate suggestiveness; at best, it provides grounds for impeachment, and trial counsel did not impeach Black on this point. Tr. at 892-94; 951-52. The Sixth Amendment did not require the presence of counsel because the lineup was on videotape. Moore, 434 U.S. at 224, 227. The fifth issue specified is not a legal objection.

TT. Conflict of Interest, Etc.

In an argument very similar to the one presented in Part II.L, supra – which was affirmed on direct appeal – Petitioner contends that his attorney "was ineffective and had a conflict of interest" as demonstrated by his asking Petitioner to endorse strategic decisions in open court. The ineffective assistance aspect of this claim was addressed in Part II.L; in the December 4, 1998 Order, the Court applied the same analysis to reject this claim on the merits. This claim does not require further discussion.

UU. Restriction on Cross Examination of Kinney -

The merits of this claim were addressed in the December 4, 1998, Order, so further discussion is not required.

VV. Cumulative Error of Trial Counsel

The merits of this claim were addressed in the December 4, 1998 Order, so further discussion is not required.

WW. Cumulative Error (Generally)

The merits of this claim were addressed in the December 4, 1998 Order, so further discussion is not required.

III. CONCLUSION

For the foregoing reasons, the Amended Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
DATE: 4/3/01
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1660WM

Leamon White,	*	
	*	
Appellant,	*	
	*	
v.	*	**On Appeal from the**
	*	**United States District**
Michael S. Bowersox,	*	**Court for the Western**
Superintendent,	*	**District of Missouri**
	*	
Appellee.	*	

Submitted: December 13, 1999
Resubmitted on Supplemental Briefs: February 10, 2000
Filed: March 14, 2000

Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and MELLOY,[1] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Leamon White appeals the denial of his petition for a writ of habeas corpus. The District Court held that all of Mr. White's claims were procedurally barred, except those adequately raised by his first amended post-conviction motion in the state courts.

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[1] The Hon. Michael J. Melloy, United States District Judge for the Northern District of Iowa, sitting by designation.

We reverse and remand for further proceedings on the merits of those claims the District Court held to be procedurally barred. We hold that the state procedural rule that barred Mr. White's second amended motion was inadequate to bar federal consideration of these claims. We affirm the remaining portion of the District Court's judgment. We agree with that Court that the claims it found open on federal habeas are without merit.

I.

Mr. White was tried and convicted of first degree murder. He was sentenced to death. Mr. White appealed to the Missouri Supreme Court, which ultimately affirmed his conviction. While Mr. White's direct appeal was proceeding, he filed a pro se motion in the Circuit Court of Jackson County, Missouri, for post-conviction relief. Mr. White's post-conviction motion became entangled in procedural difficulties because his court-appointed attorneys failed to file a timely amended motion on his behalf. Under Missouri law, this failure constituted "abandonment," and Mr. White was owed some remedy for his attorneys' failures. As a remedy, the Missouri courts treated as timely the first, but not the second, of two untimely motions filed by Mr. White's attorneys. They limited the remedy to the first motion on the ground that Mr. White had improperly signed a "blank verification." The predominant issue on appeal is whether the procedural rule barring the second motion was an adequate state ground. This issue is practically determinative of Mr. White's habeas petition because almost all of the claims raised in the first motion, which was hastily drafted, were procedurally defaulted due to inadequate fact pleading.

On August 17, 1989, Mr. White filed his pro se motion for post-conviction relief in the Circuit Court pursuant to Mo. R. Crim. P. 29.15. On September 25, 1989, the Court appointed the Missouri Public Defender's Office to represent Mr. White in post-conviction proceedings. Under the Rule, counsel has a duty

to file an amended motion if, after consulting with the movant, there appear to be grounds for doing so. Just five days before the amended motion was due, the Missouri Public Defender's Office assigned an attorney, Larry Pace, to represent Mr. White.

On October 20, 1989, Mr. Pace entered his appearance. He moved for and was granted an extension, until November 23, 1989, to file an amended motion. Under Rule 29.15, this was the only extension allowed. On November 9, 1989, fourteen days before the amended motion had to be filed, Mr. Pace improperly withdrew from the case without permission of the Court. It is now undisputed that this constituted abandonment under Missouri law. The Public Defender's Office replaced him with a second attorney, Joe Locascio. At that time, Mr. Pace had not yet begun to write an amended motion, had not secured the files of Mr. White's trial attorneys, and had not met with Mr. White.

Five days later and nine days before the final deadline, Mr. Locascio met with Mr. White to discuss his post-conviction motion. This was Mr. White's first meeting with any attorney to discuss his post-conviction motion. While at the prison, Mr. Locascio had Mr. White sign a "blank" verification, to be added to the amended motion once it was written.[2] Mr. Locascio did this because Rule 29.15 motions are void unless verified by the movant. With time so short, he felt there would be no opportunity to obtain the verification properly after the motion was written.

Despite this short-cut with the verification, Mr. Locascio missed the November 23, 1989, deadline for filing Mr. White's amended motion. As the Supreme Court of Missouri later held,

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[2]Mo. R. Crim. P. 29.15 provides: "The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion."

this constituted a second instance of abandonment under Missouri law. On November 27, 1989, Mr. Locascio filed the amended motion, four days late, and a separate motion for a thirty-day extension to file a second amended motion. Although the Circuit Court lacked the jurisdiction to do so, it granted leave to file a second motion and an extension until January 9, 1990. Mr. Locascio filed a second amended motion on January 8, 1990. Because the Court lacked jurisdiction to grant the extension, this motion was later ruled untimely. On August 1, 1990, the Circuit Court denied relief on all of Mr. White's post-conviction motions.

On appeal, the Missouri Supreme Court reversed and remanded for a determination of whether Mr. White's first and second attorneys had abandoned him. White v. State, 813 S.W.2d 862 (Mo. 1991) (en banc) ("White I"). Under Rule 29.15, it was the duty of appointed counsel to determine whether sufficient facts were asserted in the pro se motion to support the claims that it raised; to determine whether the movant had included in the pro se motion all claims for post-conviction relief known to the movant; and to correct any deficiencies in the pro se motion by filing an amended motion. Although there was no right to effective assistance of post-conviction counsel, Missouri provided a remedy, as a matter of state law, where appointed counsel "abandoned" his client by completely failing to perform these statutory duties. Luleff v. State, 807 S.W.2d 495 (Mo. 1991) (en banc). The Missouri Supreme Court, therefore, remanded for determination of whether Mr. White's first and second attorneys had abandoned him by withdrawing without leave of court, by failing to file a timely amended motion, and by failing to obtain a proper verification of the amended motion. On remand, the Circuit Court found no abandonment, but it was again reversed on appeal to the Missouri Supreme Court.

The Missouri Supreme Court found abandonment but provided only a limited remedy because Mr. White had signed the "blank" verification. White v. State, 873 S.W.2d 590 (Mo. 1994) (en banc) ("White II"). The Missouri Supreme Court held that Mr. White had been abandoned when his first attorney withdrew without court permission. This constituted abandonment because Mr. White's "second counsel did not have enough time to file a timely amended motion after he entered his appearance." Id. at 597. Additionally, the Court found that Mr. White had been abandoned when his second attorney failed to file a timely amended motion.[3] The Court found that "no action or inaction by [Mr. White] contributed to the delayed filing." Ibid.

As a remedy, the Missouri Supreme Court forgave the untimely filing of the first amended motion. The Court, however, refused to apply this remedy to the second amended motion. The Court reasoned, first, that Mr. White had been abandoned only with respect to the timing of the first amended motion, not with respect to its content. Second, the Court considered that Mr. White had waived any claim that the first amended motion was incomplete when he signed the "blank" verification: "By signing the verification in blank, defendant knew or should have known that he was an active participant in falsely verifying a document that had not yet been written." Id. at 595.

The Missouri Supreme Court remanded to the Circuit Court for consideration only of those claims made in Mr. White's first amended motion. The Circuit Court denied all of Mr. White's claims. On appeal, the Missouri Supreme Court affirmed. White v. State, 939 S.W.2d 887 (Mo. 1997) (en banc) ("White III"). The Missouri Supreme Court addressed only six of Mr. White's

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[3]The Missouri Supreme Court also requested an investigation by Missouri's Chief Disciplinary Counsel to determine whether any ethical rules had been broken by the Public Defender's Office or the two attorneys.

twenty-eight claims on the merits. The Court held that the rest of Mr. White's claims were procedurally defaulted due to the inadequate pleading of the first amended motion. Specifically, the Court found that in twenty-two of his claims, Mr. White had failed to plead sufficient facts to warrant relief.[4]

On December 26, 1997, Mr. White filed his petition for a writ of habeas corpus in the District Court. The Court held that the Missouri Supreme Court's rejection of the second amended motion was based on an independent and adequate state ground. Likewise, the Court held that Missouri's fact-pleading requirement was an independent and adequate state ground. Accordingly, the District Court found that all of Mr. White's claims were procedurally barred, except those six claims that the Missouri Supreme Court had found adequately raised in the first amended motion. On these six claims, the District Court ruled against Mr. White on the merits. Three of these claims have been appealed, along with the District Court's ruling on procedural bar.

II.

Federal review of a habeas petition is barred when a state court dismisses or rejects a prisoner's claims on independent and adequate state grounds unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Procedural default on a claim under state law may constitute an independent and adequate state ground, Harris v. Reed, 489 U.S. 255, 262 (1989), but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. Ford

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[4]Our holding that consideration of the second amended petition was not barred by an adequate state procedural ground makes it unnecessary to consider the adequacy of the state pleading rules held to bar most of the claims in the first amended petition. We likewise need not consider petitioner's assertion that his actual innocence excuses any procedural default.

v. Georgia, 498 U.S. 411, 423-4 (1991). The underlying principle is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." Easter v. Endell, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923). We believe that Mr. White was denied a fair opportunity to seek relief in this case because the procedural rule that barred his second amended petition was neither firmly established nor readily ascertainable.

The procedural default in this case was based on two limitations of Missouri's remedy for abandonment newly introduced in Mr. White's own case. First, the Missouri Supreme Court held that Mr. White's second amended motion was not entitled to consideration because he had been abandoned only as to the timing of his first amended motion, but not as to its content. At the time of Mr. White's case, the Missouri Supreme Court had just recently decided that there should be a remedy for attorney abandonment in post-conviction proceedings. The Court had stated a general rule that relief was appropriate where the attorney, and not the movant, was responsible for the untimeliness or improper verification of the motion. Mr. White's case, White II, was the first in which the distinction between timing and content was announced and employed to limit the remedy available to an abandoned defendant.

Even in retrospect, the basis for this distinction is unclear to us. The Missouri Supreme Court found that Mr. White's first attorney had abandoned him by leaving his second attorney without time to file a timely motion. We cannot see why such

an abandonment, forcing Mr. White's second attorney to prepare and write a motion in fourteen days, would not include the content of the motion. Mr. White's attorney lacked the time to write a motion because he lacked the time to write its content. With no concern for content, one day would have been sufficient. As confusing as this distinction is in retrospect, we have no trouble finding that neither Mr. White nor his attorneys could reasonably have anticipated any such rule in advance of its first application in Mr. White's own case.

Before White II, the Missouri Supreme Court had held that where abandonment occurred new counsel would be appointed and an extension provided as necessary to file an amended motion. Luleff v. State, 807 S.W.2d 495 (Mo. 1991) (en banc); Bradey v. State, 811 S.W.2d 379 (Mo. 1991) (en banc). In White II, the Missouri Supreme Court stated a new rule limiting the remedy for abandonment. The State of Missouri argues vigorously that this limit was implicit in, and correctly derived from, Missouri's prior precedents. The State's argument, however, is not determinative of the issue before us. Even though a rule appears in retrospect to form part of a consistent pattern of procedures, it should not be applied as a procedural default if the defendant could not be deemed to have been apprised of its existence. Ford v. Georgia, 498 U.S. at 423. The limitation on extensions announced in Mr. White's case is dependent upon the distinction, discussed above, between abandonment as to timeliness and abandonment as to content. For the reasons already discussed, we cannot say that Mr. White was fairly apprised of its existence. Accordingly, even if, as Missouri argues, this rule forms a consistent pattern with prior precedents, we could not apply it as a procedural default in this case.

As a second ground for limiting Mr. White's abandonment remedy, the Missouri Supreme Court held that Mr. White had waived any claim that he had been abandoned as to the content

of the motions when he signed the "blank" verification. This waiver principle was, again, first announced in Mr. White's own case, White II. The Court based this principle on the fact that Mr. White knew or should have known he was an active participant in falsely verifying a document that had not yet been written. The Missouri Supreme Court was flee to interpret its procedural rules in this way. Nevertheless, we do not see how, before the decision in Mr. White's own case, anyone could have known that signing this sort of open-ended verification constituted a waiver of remedies for abandonment.

To begin with, before White II, there was no Missouri precedent relating to the signing of "blank" verifications. Moreover, in White I, the Missouri Supreme Court itself suggested that the blame for the "blank" verification might fall on the second attorney who asked Mr. White to sign it; the Court remanded Mr. White's case to the Circuit Court for a determination of whether the attorney's actions in procuring the improper verification constituted abandonment. In the absence of any precedent, we do not see how Mr. White could have known the legal significance of the improper verification before the Missouri Supreme Court did. In sum, this principle was also neither readily ascertainable nor firmly established at the time of Mr. White's case.

Given the state of the law at the time, Mr. White did not have a fair opportunity to seek relief in this case. Mr. White was presented with a very difficult decision when his attorneys abandoned him: to lose all of his claims in an untimely motion or to sign an improper verification and hope that the motion would be at least timely. The new principles announced by the Missouri Supreme Court in his case were not available to guide him in making that decision. Because these principles were neither readily ascertainable nor firmly established, the procedural default that ensued cannot be considered an adequate state ground to bar federal review.

III.

Mr. White also appeals the District Court's denial of three claims that the District Court found were not procedurally defaulted. First, Mr. White argues that he received ineffective assistance of counsel on his direct appeal. At Mr. White's trial, the Court sustained the prosecutor's motion to strike for cause a venireman, Mr. Layson, over Mr. White's lawyers' objection. The Court had found that Mr. Layson had admitted his bias against the prosecutor; that he was a "loose cannon," likely to share extrajudicial knowledge with other jurors; and that he was a danger to both prosecutor and defendant. Mr. White's attorney failed to argue on direct appeal that Mr. Layson had been improperly removed. Mr. White contends that the trial judge's decision was groundless because Mr. Layson showed no indication of bias. Mr. White concludes, therefore, that failure to raise this "sure" argument on appeal constituted ineffective assistance of counsel.

Largely for the reasons given by the District Court, we reject this argument. Absent contrary evidence, we must assume that Mr. White's appellate counsel failed to raise this claim for reasons of strategy. Roe v. Delo, 160 F.3d 416, 418 (8th Cir. 1998). There is no contrary evidence in this case. We cannot accept Mr. White's argument that Mr. Layson showed no indication of bias and that this would be a successful claim on appeal. According to the record, Mr. Layson indicated that he believed the prosecutor was lying because he failed to mention the possibility of conviction on a lesser offense. Mr. Layson then engaged in an involved disagreement with the trial judge and the prosecutor about the nature of the penalty phase of the trial. Under Missouri law, the trial court has "broad discretion to determine the qualifications of prospective jurors." State v. Parker, 886 S.W.2d 908, 919 (Mo. 1994) (en banc). There were no clear grounds in the record for challenging the trial court's

discretionary determination that Mr. Layson was biased and a "loose cannon," dangerous to both the prosecutor and Mr. White. Mr. Layson's own words support that conclusion.

Second, Mr. White argues that he received ineffective assistance of trial counsel because of his attorneys' conflict of interest. At various points during the trial, Mr. White's attorneys asked him, before the court, to endorse or acknowledge certain decisions made with respect to his defense. Mr. White argues that his attorneys were motivated by a desire to protect themselves from ineffective-assistance-of-counsel claims, and that their questions revealed confidential and damaging trial strategies to the court and the prosecutor. Like the District Court, we cannot accept Mr. White's argument. Mr. White relies on Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir. 1991). Unlike Blanco, however, where attorneys conceded to the court during the sentencing phase that there was no mitigating evidence for their client, Mr. White can assert no prejudice here. It is true that Mr. White was asked questions to make sure that he understood his rights and that he acquiesced in certain strategic decisions. In doing so, however, no damaging admissions or revelations were communicated to the Court or the prosecutor. Asking such questions was not improper, but even if it had been, no relief would be appropriate, because no prejudice to Mr. White resulted.

Third, Mr. White argues that judicial bias deprived him of due process. Specifically, Mr. White maintains that the Missouri Circuit Court in considering his claims of abandonment had an ex parte communication with the prosecutor about the proper scope of an evidentiary hearing. Mr. White also claims that the Court adopted verbatim the prosecutor's proposed findings of fact and conclusions of law after this hearing. Even assuming that the Court did something improper, Mr. White cannot show any prejudice from this episode. The Missouri Supreme Court completely vacated the

Circuit Court's decision on appeal and found abandonment. Any prejudice to Mr. White that might have occurred either from the conversation or by the verbatim adoption of findings was eliminated by the decision of the Missouri Supreme Court. Again. we affirm the decision of the District Court.

Accordingly, we reverse in part, affirm in part. and remand to the District Court for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits.

A true copy:

Attest:
CLERK. U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-1660WM

Leamon White,	*	
	*	
Appellant,	*	
	*	
v.	*	On Appeal from the
	*	United States District
Michael S. Bowersox,	*	Court for the Western
Superintendent,	*	District of Missouri
	*	
Appellee.	*	

Filed: December 23, 1999

Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and MELLOY,[5] District Judge.

ORDER

The motion of appellant, Leamon White, to expand the certificate of appealability is granted, and the following additional issues are certified for inclusion in the certificate:

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[5]The Hon. Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

1. Whether appellant's abandonment by the public defender's office and his two appointed post-conviction lawyers during the Rule 29.15 proceeding constituted an excuse for procedural default under Missouri law.

2. Whether the Missouri Supreme Court's remedy for this abandonment was not based on an adequate and independent state ground, and violated due process.

3. Whether the action of the public defender's office in removing one attorney who had been appointed to represent Mr. White, and substituting another attorney 14 days before Mr. White's post-conviction motion was due, was an external cause of his default, and thus allows Mr. White to bring his federal constitutional claims in federal court.

4. Whether post-conviction counsel, once having abandoned Mr. White, were no longer his agents, so that their errors cannot be attributed to him, and therefore became external causes of his default.

The parties are also requested to address one other issue. As we understand the case, appellant makes two basic arguments for avoidance of a procedural bar: inadequate state ground and actual innocence. If the Court decides that either one of these arguments is well taken, is there any reason why it would need to address the other one? Are there any issues the merits of which would be opened up, so to speak, by holding in favor of appellant on the question of actual innocence, but not by a holding in favor of appellant on the issue of adequate state ground?

The appellee is allowed additional time to brief these issues. He will be given to and including January 21, 2000, for this purpose. The brief shall not exceed 25 pages. Thereafter,

appellant may file an answering brief on the same subjects, this brief to be filed on or before February 4, 2000, and not to exceed 25 pages.

It is so ordered.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 97-**
	)	**1663-CV-W-3**
MICHAEL S. BOWERSOX,	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S MOTION FOR WRIT OF HABEAS CORPUS

Pending is Petitioner's first application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, the application is denied.

I. BACKGROUND

A. The Crime

The facts of the crime (which occurred in January 1987) were summarized by the Missouri Supreme Court as follows:

> Defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.
>
> The purpose of defendant's visit was to obtain some "crack" cocaine. Wright had previously promised to get

the cocaine and sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

State v. White, 813 S.W.2d 862, 863-64 (Mo. 1991) (en banc), cert. denied, 502 U.S. 1103 (1992) ("White I"). Further details about the evidence and testimony at trial will be discussed as necessary.

B. Procedural History in State Court

Resolution of many of Petitioner's arguments depends upon an understanding of a convoluted series of events that followed Petitioner's conviction.

> After his conviction defendant filed a timely but unnotarized pro se postconviction motion on August 17, 1989. The motion court appointed counsel on September 25, 1989. Movant's attorney entered his appearance and moved for a thirty day extension on October 20, 1989. On November 9, 1989 the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. This second attorney filed a "First Amended Motion" and a motion for a thirty day extension of time on November 27, 1989. The motion court then granted movant until January 9, 1990 to file a second amended motion. Movant's counsel filed the second amended motion on January 8, 1990. On August 1, 1990 the motion court entered its findings of fact and conclusions of law denying movant relief without an evidentiary hearing.

Id. at 864. At the time, postconviction motions were governed by Rule 29.15,[1] which declared in part that "[a]ny amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days . . . ." See id.

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[1]Missouri Rule of Criminal Procedure 29.15, was "a complicated, hybrid scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of post-conviction relief." Lowe-Bey v. Groose, 28 F.3d 816, 818 (8th Cir.), cert. denied, 513 U.S. 1061 (1994). Despite the consolidation, the direct appeal and the appeal from the postconviction proceedings retain their independent identities. See Part IV.M, infra.

(quoting Rule 29.15(f)). The court noted its prior holdings that for purposes of this rule the date counsel is appointed is the date on which the trial court designates the public defender to represent the petitioner, not the day counsel actually enters his or her appearance. Counsel was appointed, and the thirty day period for filing amended motions began to run, on September 25, 1989. When First Appointed Counsel obtained a thirty day extension (to November 23, 1989) to file an amended petition, he withdrew from the case. A second attorney simultaneously entered his appearance, but did not file an amended motion until November 27, 1989 - four days after the time for filing an amended motion expired. Without addressing the effect of the Second Amended Motion filed on January 8, 1990, White I remanded the case (insofar as it related to postconviction issues) for a determination as to whether the First Appointed Counsel's withdrawal without leave of court constituted abandonment under state law. Id. at 864. The court went on to consider (and reject) those issues raised on direct appeal. Id. at 865-868.

On remand, the trial court dismissed the 29.15 motion because it was not properly verified[2] and alternatively reinstated its prior findings of fact and conclusions of law. It also held that Petitioner had not been abandoned by any of his postconviction counsel (because counsel could not abandon a matter that was not properly before the court, held to be true in this case because of the improper verification). On appeal, the Missouri Supreme Court concluded that the verification was sufficient. State v. White, 873 S.W.2d 590, 594 (Mo. 1994) (en banc) ("White II"). However, the court also observed that because Rule 29.15 contemplated only one extension of time, the second extension of time was invalid and the only valid extension was the one granting Petitioner until November 23, 1989 to file his amended petition. The court determined this was an unalterable

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[2]The verification issue is not relevant to these proceedings and, in the interests of brevity and clarity, will not be detailed here.

requirement of Rule 29.15, holding that it would "still strictly adhere to the requirement that all grounds not raised in the pro se motion are waived, with the exception of those filed in a timely amended 29.15 motion." Id.

Having held the state trial court had jurisdiction over Petitioner's pro se 29.15 motion, the next significant issue (for purposes of the present case) was whether the court had jurisdiction over the first or second amended motions. Both motions were untimely - the first because it was filed after the extended deadline of November 23, 1989, and the second because it was filed pursuant to an impermissible second extension of time. Id. at 595-96. The court "conclude[d] that the untimely filing of defendant's [first] amended motion was not the result of negligence or intentional conduct by White. Rather, the untimely filing resulted exclusively from the inaction of defendant's appointed counsel." Id. at 597. The court went on to conclude that Petitioner was abandoned by his First Appointed Counsel, but only insofar as to the *timing* of its filing, not its content. The court observed "that there is no constitutional right to post-conviction counsel and that failure of the attorney to comply with procedural rules in a collateral proceeding falls on the shoulders of the defendant." id. at 598. To fashion a remedy for the abandonment which would cure the damage caused by the improper timing, the court reinstated the First Amended Motion. It declined to reinstate the Second Amended Petition because, even absent the abandonment by the first appointed counsel, Petitioner never had a right to file a Second Amended Petition. Id. at 599. ("To let the defendant also have the benefit of the second untimely amended motion would grant the defendant additional relief beyond that which he was originally entitled to receive under Rule 29.15."). The case was remanded to the trial court for consideration of the issues contained in the First Amended Motion.

On remand, the trial court denied Petitioner's claims without holding an evidentiary hearing. The Missouri Supreme Court affirmed. White v. State, 939 S.W.2d 887 (Mo.) (en banc), cert. denied, 118 S. Ct. 365 (1997) ("White III.)" The court noted Rule 29.15's requirement that a petition state facts that demonstrate entitlement to relief. It also referred to a previously-established pleading rule applicable in postconviction proceedings:

> [N]o evidentiary hearing will be required unless the motion meets three requirements: '(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant.' State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). Thus, to obtain an evidentiary hearing on claims of ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing (1) that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced.

Id. at 893. The court then considered Petitioner's remaining arguments, rejecting those that required a hearing out of hand based on Petitioner's failure to plead facts. It also addressed - and rejected - the few arguments that were addressed on the merits based on the records before the trial court. Ultimately, the trial court's decision was affirmed in its entirety.

II. PROCEDURAL DEFAULT

"Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of... procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims." Sawyer v. Whitley, 505

U.S. 333, 337-39 (1992) (citations and emphasis omitted). To avoid a procedural default, the habeas petitioner must fairly present his claim to the state court, that is, he must present the same facts and legal theories to the state court that he later presents to the federal courts. Morris v. Norris, 83 F.3d 268, 270 (8th Cir. 1996). In addition, as the quote from Sawyer suggests, it is not enough for Petitioner to simply raise the arguments; they must be raised in a manner that complies with state law. Failure to do so constitutes a procedural default. Sweet v. Delo, 125 F.3d 1144, 1151 (8th Cir. 1997), cert. denied, 118 S. Ct. 1197 (1998). Here, Petitioner's failure to follow state-law pleading requirements for securing a hearing operates as a procedural bar.[3] "If state procedural rules prevent the petitioner from obtaining such a hearing, then the petitioner is' also procedurally barred from obtaining habeas relief in a federal court . . . ." McCall v. Benson, 114 F.3d 754, 757 (8th Cir. 1997); see also Turner v. Delo, 69 F.3d 895, 896-97 (8th Cir. 1995) (state court holding that petitioner "failed to provide the facts required under Missouri law to entitle him to an evidentiary hearing... constitutes a Procedural default"); Smith v. Groose, 998 F.2d 1439, 1441 (8th Cir. 1993).

Although a procedurally defaulted claim ordinarily will not be considered in a habeas proceeding, there are two circumstances in which the procedural bar can be lifted.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

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[3]This issue is discussed in further detail in Part IV.O, infra.

Coleman v. Thompson, 501 U.S. 722,750 (1991). After reviewing the record in this case, the Court concludes the issue of procedural default predominates over the substantive claims asserted by Petitioner. Comprehension is best served by examining these attempts to lift the procedural bar before considering Petitioner's substantive arguments.

A. Actual Innocence

"To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." Schlup v. Delo, 513 U.S. 298, 321 (1995).

> [A] petitioner who raises a gateway claim of actual innocence must satisfy a two-part test. First, the petitioner's allegations of constitutional error must be supported with new reliable evidence that was not presented at trial. Second, the petitioner must establish that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The actual innocence exception requires review of procedurally barred, abusive, or successive claims only in the narrowest type of case--when a fundamental miscarriage of justice would otherwise result.

Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir, 1997) (en banc), cert. denied, 118 S. Ct. 887 (1997).

To support his gateway claim of actual innocence, Petitioner has filed a series of documents, affidavits, reports and other material referred to collectively as his Appendix of Actual

Innocence (the "Appendix"). Subsequently, he filed additional affidavits and materials to supplement the Appendix. Respondent raises a threshold issue by moving to strike all of the material based on the Supreme Court's decision in Herrera v. Collins, 506 U.S. 390 (1993). In Herrera, the Supreme Court addressed the viability of a *substantive* claim of actual innocence entitling a prisoner to relief. As explained in Schlup, despite the label of "actual innocence," the concepts can serve different purposes and, hence, different analyses will apply. In Schlup, the claim of actual innocence was not offered as a ground entitling the prisoner to relief, but rather as a "gateway" through which previously defaulted constitutional arguments could be considered. Schlup, 513 U.S. at 515-16; see also Amrine v. Bowersox, 128 F.3d 1222, 1227 (8th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 1807 (1998) ("Amrine's claim is unlike Herrera's because he does not seek relief on the basis that he is actually innocent, but rather on the basis of an unconstitutional trial. He raises actual innocence as a means to avoid a procedural bar to consideration of his constitutional claims so his gateway claim is properly considered under Schlup.").[4]

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[4]In arguing to strike the Appendix and subsequent affidavits, Respondent relies exclusively upon Herrera and makes absolutely no mention of Schlup - despite the obvious fact that Petitioner has presented the Appendix to support the actual innocence exception pronounced in Schlup and has carefully separated his "actual innocence as grounds for lifting the procedural bar" arguments from his "actual innocence as grounds for relief" arguments. Respondent's blindness to Schlup has made the Court's analysis of this issue very difficult. The failure to even acknowledge Schlup's existence is also curious not only because it is a significant Supreme Court opinion, and not only because it arose from the Eighth Circuit, but because it arose from this *state*.

There may come a time when Respondent expects habeas petitions to be ruled in an extremely prompt manner. See 28 U.S.C. § 2266(b)(1)(A). Respondent's expectation cannot be honored if Respondent fails to acknowledge and discuss controlling Supreme Court precedent.

A petitioner asserting a Schlup "gateway" claim must support his allegations with reliable evidence. Schlup, 513 U.S. at 324; McCoy v. Norris, 125 F.3d 1186, 1190 (8th Cir. 1997), cert. denied, 118 S. Ct. 1195 (1998); Battle v. Delo, 64 F.3d 347, 354 (8th Cir. 1995), cert. denied, 517 U.S. 1235 (1996). There are restrictions (as discussed below) on the type of evidence that can be considered, but the only way to determine whether Petitioner's efforts satisfy these requirements is to look at the Appendix. Therefore, Respondent's Motion to Strike the Appendix (Doc. # 22) is denied. Similarly, Respondent's Motions to Strike the supplemental affidavits are denied to the extent those affidavits present information that purportedly bears on Petitioner's actual innocence. The Motions that are denied are Documents 28, 34, and 37. The Motion to Strike filed on July 8, 1998 (Doc. # 26) is denied to the extent that it seeks to strike Cleveland Ford's affidavit.[5]

To support a claim of actual innocence, the petitioner must present *evidence* not merely allegations or speculations - to prove his point. Weeks, 119 F. 3d at 1352-53. The evidence must demonstrate his factual innocence of the crime; evidence bearing on the allegedly improper application of criminal law will not suffice. Embrey v. Hershberger, 131 F.3d 739, 741 (8th Cir. 1997)(en banc), cert. denied, 119 S. Ct. 78 (1998); Pitts v.

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[5]The remaining portion of this Motion addresses an affidavit that bears on trial counsel's performance, not on Petitioner's assertion of actual innocence. The same is true of the Motion to Strike filed on October 1, 1998 (Doc. # 40). In addition, Petitioner has attached affidavits and other materials to his Traverse, all of which purport to bear on trial counsel's ineffectiveness. These materials do not bear on Petitioner's factual innocence, and cannot be considered in this proceeding because (as will be seen in Part IV, infra). Petitioner's claims of ineffective assistance of counsel have either been procedurally defaulted or Petitioner has had a full and fair opportunity to develop the facts and this Court is constrained to abide by the state court's factual findings. Petitioner cannot offer additional evidence bearing on the ineffectiveness of his trial counsel at this juncture.

Norris, 85 F.3d 348, 350-51 (8th Cir.), cert. denied, 117 S. Ct. 403 (1996). Examples of the proper type of evidence include "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence . . ." Schlup, 513 U.S. at 324. In addition, "an important initial step in the analysis of a habeas petitioner's claim of actual innocence" is whether the proffered evidence is new. McCoy, 125 F.3d at 1190; see also Schlup, 513 U.S. at 324. Evidence that is merely cumulative of evidence already offered at trial will not satisfy the standard. McCoy, 125 F.3d at 1191. In addition, evidence that is known to or readily available to the criminal defendant will not satisfy the Schlup standard. E.g., Schlup, 513 U.S. at 327-28 ("the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either *excluded or unavailable at trial.* (emphasis added)); Bannister v. Delo, 100 F.3d 610, 618 & n.7 (8th Cir. 1996), cert. denied, 117 S. Ct. 2526 (1997); see also Lucas v. Johnson, 132 F.3d 1069, 1083 n.3 (5th Cir. 1998). "In deciding whether a petitioner has made the necessary showing of innocence, a federal court must make its own determination of whether the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial is sufficient to warrant consideration of the otherwise barred claims. If a petitioner presents evidence of his actual innocence so strong that a court cannot have confidence in the outcome of his state trial, it should not allow his execution unless it is also satisfied that his trial was free of nonharmless constitutional error." Amrine, 128 F.3d at 1227 (quotation omitted). This inquiry may require the Court to make credibility decisions about the witnesses involved. Id. at 1228.

With this legal backdrop in place, the evidence presented at trial and the evidence Petitioner currently relies on can be considered. The primary evidence against Petitioner at trial was the testimony of Kinney and Black - the surviving victims of the attack. Early in her direct examination, Kinney testified that

Petitioner was one of the three individuals who came to the house she shared with Wright, and that the other individuals were Roger Buckner and a man with the last name of "Ford." T.Tr. at 593.[6] She testified that she had been using crack cocaine daily for the past six months, T.Tr. at 595, and that she had been smoking crack the night of January 5 and the morning of January 6. T.Tr. at 596. She explained that she arrived at her brother's house at approximately 7:00 p.m. and, along with five or six other people, smoked crack. T.Tr. at 598-99. Wright, Black, and Black's girlfriend were among the other people there. T.Tr. at 601-02.[7] At approximately midnight, Black drove Wright and Kinney, along with Kinney's sons, Black's girlfriend and Black's brother (Earl) to the house Wright and Kinney shared. T.Tr. at 603. She put her kids to bed, whereupon the adults resumed smoking crack. T.Tr. at 604. At some point, Black and Wright left to take Black's girlfriend and Earl home; approximately forty-five minutes after they returned from this errand somebody knocked at the back door by the kitchen. T.Tr. at 606-07. Kinney answered the door and admitted two people she did not know who were looking for Wright. T. Tr. at 608. (Earlier, Wright had indicated he was expecting some visitors. T. Tr. at 609). Kinney testified that Petitioner was one of the visitors, T. Tr. at 610, and she noticed that he had a solid gold tooth on the right side of his mouth. T.Tr. at 612-13. She also indicated that Buckner looked familiar and thought he knew her brother, T.Tr. at 663-64, and recalled seeing a blue van parked outside the house after Buckner and Petitioner came in. T.Tr. at 632.

The visitors and Wright began discussing a drug transaction. T.Tr. at 610. At some point during the conversation someone

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[6]"T.Tr. at __" is a reference to the trial transcript.

[7]Kinney's sons, Deonta and Raymond (ages eight and seven, respectively) were also there, but were in another room and not taking drugs. T.Tr. at 601.

slammed open the back door and entered the house. T.Tr. at 614. Kinney recognized this third visitor as someone she had seen before but did not recall his name at that time. He told Kinney he was with White and Buckner. T. Tr. at 615. As Kinney returned to the front room and sat on the couch, Petitioner and Buckner drew their guns and Petitioner asked Wright "where the dope was." T.Tr. at 616. After Wright denied having any drugs, Petitioner began hitting him on the head with the gun and kicking him, and kept demanding to know where the drugs and money were. T.Tr. at 617-19. Eventually, Petitioner and Buckner began beating Black as well. T.Tr. at 620.

At one point, Petitioner told Buckner to get something with which to tie Up Wright, and Buckner located an extension cord. They tied Wright's knees and hands together and continued questioning him. When Wright continued to deny having any answers for his attackers, Petitioner took an extension cord and wrapped it around Wright's neck, choking him. T.Tr. at 621-22. When this failed to kill Wright, Buckner made Kinney get on the floor and used her belt and some tape to tie her hands and legs. T.Tr. at 623. Petitioner declared that "[a]ll three of them die." T.Tr. at 624. Buckner went into the kitchen and returned with a kitchen knife. Kinney saw Ford grab Wright's head and hold it back while Petitioner cut Wright's throat. T.Tr. at 626-27. Buckner then made Kinney go into a bedroom. After some debate, he then took the knife from Petitioner and tried to cut Kinney's throat from behind. T.Tr. at 630. The men left soon thereafter.

Kinney's sons contacted the police, and she was taken to the hospital for surgery. She subsequently spoke to the police and was shown some photographs and identified State's Exhibit 102 as a photograph of the man who cut her neck; the picture was of Roger Buckner. T.Tr. at 637-38. She did not recall whether the police ever showed her photographs at any other time that

month while she was in the hospital, nor did she recall how many other occasions the police came to the hospital to talk to her. T.Tr. at 638. On cross-examination, she also disavowed any memory of identifying another individual who was never charged. T.Tr. at 650. In March 1987, the police showed her some additional photographs and she identified State's Exhibit 112 as a photo of the third man who had come to her house (Ford). T.Tr. at 639. The following day, she picked Ford out of a lineup. Finally, in May 1997 she viewed a videotaped lineup and identified Petitioner as one of the men at her house. T.Tr. at 644-45. There is no evidence that Petitioner's photograph was ever shown to Kinney prior to her picking him out of the videotaped lineup. Finally, prior to concluding her direct testimony, Kinney was shown three other photographs, one of which (State's Exhibit 121) was a photograph of Christopher (A.J.) Constantine; Kinney testified that none of the people in those three photographs were at her house that night. T.Tr. at 645-46.

On cross-examination, Kinney was asked about her descriptions of the men. She testified that she told detectives Petitioner was "a black male in his late 20's, five-nine to five-ten, about 170 pounds" and denied telling them that any of the three men spoke with a Jamaican accent. T.Tr. at 658. She did not recall telling them that Petitioner had a gold tooth, T.Tr. at 658-59 - although portions of Kinney's statement to police were read at trial, indicating that she did mention his gold tooth. T.Tr. at 661. She also testified that the second man had facial hair. T.Tr. at 661. Upon further questioning about the additional photos (including Constantine's), Kinney admitted that she knew Constantine to be a drug dealer and that she knew someone named "A.J.", but denied knowing him personally. T.Tr. at 679-80. She also denied telling either her brother or Black that Constantine was one of the men at her house. T.Tr. at 680-81. Petitioner's trial attorney also asked questions demonstrating Kinney's prior drug use. T.Tr. at 669-75.

Black also testified about his prior use of crack cocaine. T.Tr. at 841-42. His testimony about the events of the evening and early morning surrounding the attack substantially mirrors Kinney's testimony. He confirmed Kinney's testimony about a blue van outside her house. T.Tr. at 861-62. He recognized Buckner, but had never seen the second man before. He described the second man as "probably about five-nine, five-ten, probably about 160, and he had a beard, a full beard, and moustache and dark -- well, not real dark skin. He was dark skinned." T.Tr. at 863. Unlike Kinney, he testified that the second man wore a green, red and white stocking cap. Compare T.Tr. at 661 with T.Tr. at 863. Upon viewing Petitioner at trial, Black testified that he looked like "the man that came in with [Roger] Buckner." T.Tr. at 890.

On cross-examination, Black denied knowing anyone by the name of A.J. Constantine or Christopher Constantine. T.Tr. at 895. Upon being shown State's Exhibit 121 (Constantine's picture), Black conceded that he had "some of the same characteristics" as the second man T.Tr. at 896. He denied previously telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine as the second man. T.Tr. at 924, 932. He denied telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine. Black was never explicitly asked if Constantine *was* the second man. To the contrary, he insisted that Petitioner was the second man. T.Tr. at 953-56. He also denied that the second man spoke with an accent. T.Tr. at 938-39, 955.

Other witnesses linked Petitioner to Buckner and Ford to the crime; still other witnesses confirmed Kinney's and/or Black's identifications and rebutted defense counsel's attempt to case doubt on the validity or consistency of those identifications. Officer Mark Hatcher arrested Buckner (pursuant to an arrest warrant) on April 11, 1987. He found Buckner hiding in a closet

in his (Buckner's) girlfriend's apartment. During a search of the premises, he also found a wallet containing Petitioner's driver's license and social security card. T.Tr. at 713. Officer Carl Kegler confirmed that Kinney "immediately recognized [Petitioner] as one of the assailants that had been in the house the night that she was stabbed and Mr. Wright was killed. . . ." T.Tr. at 720. Detective John Peterson testified that he examined Petitioner for distinguishing characteristics shortly following his arrest and that at that time Petitioner had "one solid gold tooth and two open-faced tooths and one of them had three diamonds in it." T.Tr. at 729. Detective Edward Glynn testified that on January 12, 1987 he went to the construction site where Buckner worked in an attempt to find Buckner when he picked up his paycheck. T.Tr. 740-41. By the time he had arrived, Buckner's check had been picked up by someone in a black Cadillac. The Cadillac's trek away from the site was observed by a police helicopter unit, and Glynn was thus directed to a residence in Independence, Missouri. Upon arriving, Glynn found the black Cadillac parked outside a residence. Petitioner was inside the residence. T.Tr. at 741-43. At this time, Petitioner was not a suspect; he voluntarily went to the police station with Glynn, where he was briefly interviewed (by someone other than Glynn) and photographed. T.Tr. at 742-43.[8]

Detective Clarence Gibson testified that he visited Kinney at the hospital following the attacks. She identified Buckner out of a photo array, but failed to pick Constantine's picture out of a different array. T.Tr. at 753-54. Detective Gibson also testified that he interviewed Petitioner when Detective Glynn brought him to the station. Petitioner told him he had loaned his car to an acquaintance named Larry Thomas (whose address he did not know) for the purpose of picking up Buckner's check.

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[8]Glynn had no knowledge as to whether Petitioner's photograph was shown to Kinney when she was interviewed the next day. T.Tr. at 747. Other witnesses denied that this occurred, and nobody testified to the contrary.

Petitioner admitted knowing who Buckner was and that Buckner was "on the run." T.Tr. at 755. He denied knowing where Buckner was hiding.

Detective Gibson confirmed that Kinney told her the number two man had a gold tooth. T.Tr. at 757. He testified that he showed Kinney another photo array on January 18, 1987 that did not include a picture of either Buckner, White or Ford, and Kinney failed to positively identify anyone in that array. T.Tr. at 758. He showed her an array on March 15, 1987, and she identified Ford as the number three man. Up to this point in time, Detective Gibson had not shown Kinney Petitioner's picture, T.Tr. at 759, 782-83 - in fact, up to this point in time he did not even know that the police *had* Petitioner's picture. T.Tr. at 771-72.

One of Buckner's co-workers (Earl Wells) testified that he lived across the street from Buckner and regularly rode to work with him. T.Tr. at 958. Buckner owned a white Plymouth or Pontiac, but the last time they rode together Buckner was driving a black Cadillac. On the night of January 5,[9] he saw Petitioner drive Buckner's white car to Buckner's house and knock on Buckner's door. T.Tr. at 968-69. Buckner came out and talked with Petitioner for thirty to forty minutes. T.Tr. at 968-70. Eventually, Petitioner got back in Buckner's car and drove off; Buckner went back into his house. T.Tr. at 970. Later, Buckner drove off in the black Cadillac. T.Tr. at 971.

Detective Lee Floyd testified that he interviewed Kinney's sons. He showed Raymond (the younger child) a photo array that included pictures of Buckner and Constantine, but the boy

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[9]Although Wells could not testify as to the precise date, the date can be deduced based on Wells' other testimony and testimony from James Brown (Wells' and Buckner's employer) and Officer Carl Kegler (who went to the construction site and talked to Wells).

did not identify anyone in the array. T.Tr. at 988-89. Deonta viewed the same array and indicated that he recognized Constantine but denied that anyone in the array (including Buckner and Constantine) had been at his house on the night of the attack. T.Tr. at 989.

Raymond was one of the Petitioner's two witnesses: at the time he was ten years old. He testified that one of the men that visited his house that night "talk[ed] funny." When asked what kind of voice he understood that to be, Raymond said that it was a "Jamaican accent." T.Tr. at 999. He also testified that he had a chance to see that man's face, and Petitioner was not the man who spoke with a Jamaican accent. T.Tr. at 999-1000. However, when shown a series of photographs (including State's Exhibit 121, Constantine's photo), Raymond denied that any of them looked familiar. T.Tr. at 1000-01.

As will be discussed in greater detail below, nothing contained in the Appendix or the supplemental affidavits demonstrates Petitioner's actual innocence as contemplated by Schlup. Most of the "evidence" is either not new, not evidence, was readily available to Petitioner, or is not exculpatory.

The Appendix contains the following items:

1. Petitioner's sister (Joyce Williams) provides an affidavit averring that she went to work at approximately 5:00 p.m. on January 5, 1987 and left Petitioner at her house to watch her children. She returned home sometime between 2:00 and 4:00 a.m. the next day, and Petitioner was asleep on a bed. She went to sleep around 8:00 a.m., and Petitioner was still sleeping.

There are two with problems Williams' proffered testimony. First, it is not "new" and was available to Petitioner. Petitioner would have had equal access to information about his own

alibi.[10] and Williams communicated her information to Petitioner's trial counsel.[11] Secondly, Williams' statement does not exonerate Petitioner: Kinney testified that she, Wright and Black arrived at her house at midnight. T.Tr. at 603, and after accounting for all of the intervening events, T.Tr. at 605-07, the men entered her house between 1:30 and 2:00 a.m. Williams provides an alibi that starts, at best at 2:00 and, with certainty, no earlier than 4:00.

2. Frank Johnson provides an affidavit averring that he was riding on a Metropolitan Transportation Service van and overheard a woman who identified herself as Carol Kinney talking to the driver. The woman and the driver appeared to be friends. She told the driver that "a Jamaican named A.J. had broken into her house and killed her boyfriend." Later, while incarcerated in the Jackson County jail, Johnson "ran into" Petitioner and, after talking with him, realized the importance of the woman's statement. Johnson's affidavit does not contain a strong aura of believability. Most importantly, there is no indication that the speaker was actually Carol Kinney.

3. Dan Grothaus, a private investigator, provides an affidavit detailing the results of his investigation. He avers that Kinney's sons identified Constantine as one of the people involved in the murder, but provides no basis for this conclusion. He also provides information about Constantine - he fit the age, height and weight description of the second man supplied by both

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[10]In fact, Petitioner's pro se brief before the Missouri Supreme Court argued that his attorney should have called an alibi witness, but never identified the witness or divulged the nature of the alibi. White III, 939 S.W.2d at 899.

[11]This latter point raises an interesting dilemma. Petitioner contends that his trial counsel provided ineffective assistance in failing to call Williams to the stand. This claim is defaulted, and Petitioner relies, in part, on the content of the testimony to demonstrate that a miscarriage of justice has occurred. However, because the testimony was known to Petitioner, it cannot be relied upon to demonstrate his actual innocence.

Kinney and Black, he was a native of Jamaica, and was a crack dealer during the time in question. Grothaus also contacted Kinney in March 1998 and showed her Constantine's picture, whereupon Kinney said "He was there that night" and further identified him as the *third* man to come to her house. She also explained to Grothaus that the hit was meant for her brother's house. Grothaus showed Kinney a picture of Petitioner, and she admitted that the two men looked alike. She continued to insist that none of the assailants had a Jamaican accent. Grothaus contacted Kinney again in April 1998, and she told Grothaus she was sure Petitioner was the man who killed Wright.

Grothaus spoke with Raymond Kinney in February 1998. He told Grothaus that he "remembers little about the killing and attack. He, however, remembers that one of the suspects spoke with a Jamaican accent."

As indicated above, there is no support for Grothaus' statement that the Kinney children identified Constantine. Raymond's statement that one of the assailants spoke with a Jamaican accent was presented at trial and therefore is not new evidence. Moreover, even if Raymond's statement is true, it does not demonstrate that Petitioner was the mis-identified assailant. Finally, Kinney's statements fall far short of constituting a recanting of her earlier testimony. Cf. Amrine, 128 F.3d at 1228 ("Amrine has come forward with evidence not previously available which directly contradicts the key evidence against him at trial. He now has a sworn recantation by the only previously unchallenged eyewitness, Jerry Poe. Poe's affidavit contradicts what he said at trial. He denies having seen the killing and says his identification of Amrine as the killer was false and induced by pressure from Brooks and Hemeyer."). Any uncertainty about her ability to identify Petitioner more than ten years after the crime are easily understood in light of the passage of time and the apparent physical similarities between Constantine and Petitioner. However, her memory --

and ability to identify her assailant -- was undoubtedly better at the time of trial than it was in March of this year. Finally, all of the information about Constantine's criminal activity is irrelevant to Petitioner's guilt or innocence absent some independent link between Constantine and Wright's murder - a link that Petitioner fails to establish.

4. Roger Buckner has submitted an affidavit admitting that he was one of the three men who entered Kinney's residence and that he has been sentenced to life in prison for his role in Wright's killing. However, he denies that Petitioner was present and disavows Petitioner's involvement in any way. Buckner's affidavit might be more persuasive if he identifies the other two men who were with him. In any event, the affidavit does not undermine this Court's confidence in the jury's verdict.

5. Charles Ross, a private investigator, prepared a report of his interview with Black in July 1987. The only potentially exculpatory information contained in Ross' report is the following: "Carol Kinney told him one of the other guys had the street name of 'A.J.', but that he was not sure which one she was talking about." Black's statement to Ross is not evidence, and Black denied the substance of the statement at trial - so the possibility that Kinney made the statement to Black is not really new. Moreover, the statement does not identify the second man as A.J., so it does not exonerate Petitioner.

6. Laura Tyler, an attorney with the State Public Defender, wrote a letter to Petitioner's lead trial counsel, Robert Duncan. The important part of Tyler's letter appears to be her suspicion that the police showed Petitioner's picture to Kinney prior to the time admitted to by the police at trial. Even if this "belief" were evidence, it does not demonstrate Petitioner is factually innocent of the crime.

7. Reports prepared by police following interviews with Raymond, Deonta and Carol Kinney are included in the Appendix. They were also used by Petitioner's trial counsel at trial (to the extent permitted by the rules of evidence), so Petitioner cannot contend they were unavailable. Moreover, they do not provide any new information.

8. Raymond, Deonta, and Carol Kinneys' statements were also transcribed. What has already been said about the police reports in the preceding paragraph applies with equal force to these statements.

9. A police report of an interview with Freddie Wright (Don Wright's brother) dated January 6, 1987 relates that upon being shown Buckner's mug shot, Freddie Wright "indicated that he does not know his name, but indicated that he runs around with Jamaicans." This report appears to have been available to Petitioner at the time of trial. Moreover, it does not demonstrate that a Jamaican (much less Constantine) was with Buckner the night Wright was murdered, nor does it demonstrate that Petitioner was not.

10. A police report of an interview with Ben Kinney (Carol Kinney's brother) dated January 7, 1987, summarizes his statements to the effect that he had previously sold drugs for "two black males he knows only as AJ [sic] and Josh, who pretend to be Jamacians [sic]." Ben also indicated that they held him responsible for a shortage in money. This report appears to have been available to Petitioner at the time of trial. Moreover, it does not demonstrate that A.J. was - or Petitioner was not - involved in Wright's murder.

11. A police report dated January 14, 1987 indicates that Jeanette Rambo, sister of Steve Rambo, told Kinney "that the # 2 suspect" used to stay with her brother; she did not know his name "but said his moniker was 'Monster Man.'" The report

indicates that the police were not familiar with anyone known to use that nickname. As with the prior police reports, this one appears to have been available at trial. Moreover, it contains no evidence demonstrating Petitioner's innocence.

12. The Appendix contains a police report from a completely unrelated case describing the taking of a Polaroid photograph of a suspect. Petitioner offers this report to show that such events are usually described in police reports, whereas in this case no police report indicates that Petitioner's photograph was taken. This information has no bearing on Petitioner's factual innocence.

13. Depositions of Black, Kinney, and Kinney's sons are included in the Appendix. Although Petitioner's trial counsel did not attend the depositions, he had copies of the transcripts and used them (to the extent he could) during Petitioner's trial. The information they contain is neither new nor unavailable.

14. The final two documents in the Appendix are transcripts of Deonta's and Raymond's testimony at Buckner's trial. Buckner's affidavit indicates he was convicted in February 1989; but in his Amended Petition for Writ of Habeas Corpus he alleges that he went to trial in October 1988. Amended Petition, ¶ 51. The transcript from Petitioner's trial indicates Raymond testified in his trial on February 6, 1989, and Deonta did not testify at all. It thus appears that the transcript from Buckner's trial was available at the time of Petitioner's trial. In addition, Raymond and Deonta were available as witnesses at the time of Petitioner's trial.

Nonetheless, assuming that these materials are new and can be considered in a Schlup inquiry, they do not constitute unassailable proof of Petitioner's innocence. Raymond identified one of the men as having long, curly black hair and another man as being "chubby." He further identified the

chubby man as being someone he had seen at Ben's house and knew his name to be A. J. He also testified that the chubby man talked like a Jamaican. This testimony is simply evidence that contradicts other evidence offered at Petitioner's trial - it is not a particularly trustworthy eyewitness account, nor does it affect the Court's confidence in the verdict. In addition to concerns about Raymond's opportunity to see the assailants, the Court notes that Raymond also testified that Buckner as not one of the three men - a fact that is contradicted by Buckner's affidavit - and that when shown Constantine's picture during the trial, he denied that Constantine was one of the three men.

Deonta also testified that one of the three men was "chubby" and identified him as "A.J." He was unable to identify the other three men, and was never asked whether Petitioner was one of the men. Deonta's testimony is not so persuasive or forceful to make it more believable than Black's or his Carol Kinney's.

The affidavits offered to supplement the Appendix do not alter the Court's conclusions. Ford submits an affidavit admitting that he was involved in the killing and identifying "Roger Buckner and a Jamaican friend of his" as the other two men involved. He admits that at his plea hearing (for second degree murder), he told the judge that Petitioner was involved, but now contends that this was not true and that Petitioner was not involved. Contradictory statements offered under oath do not persuade the Court that Petitioner is actually innocent.

Charles Ross submits an affidavit that is substantially the same as his report described on page 19, supra, and it includes a copy of that same report. The Court's earlier comments apply to Ross' new affidavit.

Buckner has submitted a second affidavit swearing that the other men involved with him were Ford and Constantine, and explaining that he was "reluctant to identify A.J. Constantine as

the second man involved in the killing of Don Wright . . . for fear of reprisals against my family, and because I think it is wrong to tell on a person."

As noted earlier, the Court is empowered to consider issues related to credibility. Assuming no other faults exist with respect to Buckner's latest affidavit, the Court does not believe that his change of heart after ten and half years of silence outweighs the eyewitness testimony of two of the victims. The fact that one of the men convicted of murdering Wright is now willing to exculpate Petitioner does not undermine the Court's confidence in the jury's verdict.

Finally, Dorothy Merrell - the mother of Ben Kinney's girlfriend - offers an affidavit dated August 25, 1998 indicating that on the night of January 5, 1987, Wright, Ben and her daughter "were in her house with two other men. One of the men she "now understand[s]" was Roger Buckner, and the other was a man she knew as "J" and she has since identified as Constantine. Wright bragged about having a lot of drugs and invited the man she now identifies as Constantine to come to his house at about 3:00 to buy some. Merrell also avers that Kinney told her that the men who killed Don Wright were the same people that were at her house.

Petitioner presents no indication that Merrell was unavailable as a witness. Moreover, she was not a witness to the crime, and does not exculpate Petitioner.

Having considered all of the evidence offered by Petitioner, the Court concludes that Petitioner has failed to satisfy Schlup's standards for demonstrating a miscarriage of justice. The evidence that Schlup permits the Court to consider does not undermine the Court's confidence in the jury's verdict of guilt.

B. Ineffective Assistance of Postconviction Counsel, Part I

Petitioner concedes that the Eighth Circuit has repeatedly held that ineffective assistance of postconviction counsel cannot serve as cause and prejudice justifying removal of the procedural bar, but contends the Supreme Court left the issue open in Coleman v. Thompson, 501 U.S. 722 (1991). The Court disagrees with Petitioner's characterization of Coleman. "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 501 U.S. at 752 (citations omitted). In any event, Petitioner has accurately summarized the holding of cases from the Eighth Circuit. E.g., Sidebottom v. Delo, 46 F.3d 744, 751 (8th Cir.), cert. denied, 516 U.S. 849 (1995); LaRette v. Delo, 44 F.3d 681, 687-88 (8th Cir.), cert. denied, 516 U.S. 894 (1995); Pollard v. Delo, 28 F.3d 887, 889-90 (8th Cir.), cert. denied, 513 U.S. 1003 (1994); Jolly v. Gammon, 28 F.3d 51, 54 (8th Cir.), cert. denied, 513 U.S. 983 (1994); Nolan v. Armontrout, 973 F.2d 615, 617 (1992); McCoy v. Lockhart, 969 F.2d 649, 650-51 (8th Cir. 1992); Johnson v. Lockhart, 944 F.2d 388, 390 (8th Cir. 1991). Therefore, ineffective assistance of postconviction counsel cannot serve as a basis for excusing the procedural bar.

C. Abandonment by Postconviction Counsel

In an argument the Court considers related to the discussed above, Petitioner relies on White II's conclusion that he was abandoned by the first attorney to represent him in postconviction proceedings. Given that Petitioner was not constitutionally entitled to a hearing in the postconviction proceeding, and given that he was not entitled to constitutionally effective legal assistance in that proceeding, Petitioner's argument appears doomed. This conclusion is reinforced by an Eight Circuit opinion to this effect. Mack v. Caspari, 92 F.3d 637, 639-40 (8th Cir. 1996), cert. denied, 117

S. Ct. 1117 (1397). Similarly, Petitioner's argument regarding the sufficiency of the Missouri Supreme Court's remedy for the abandonment is beyond this Court's consideration. Id. at 640.[12]

D. Adequacy of State Grounds

Finally, Petitioner contends that the grounds relied upon in White III are inadequate to serve as the foundation for a procedural default. "The state procedural rule must be both firmly established and regularly followed.., to preclude federal review." Reese v. Delo, 94 F.3d 1177, 1181 (8th Cir. 1996), cert. denied, 117 S. Ct. 2421 (1997).

The Court disagrees with Petitioner's contentions. In cases decided before the First Amended 29.15 Motion was filed, Missouri courts frequently held that "[i]n order to qualify for an evidentiary hearing, movant must meet three requirements: (1) The motion must allege facts, not conclusions, warranting relief; (2) those facts must raise matters not refuted by the files and records in the case; (3) the matters complained of must have resulted in prejudice to the defendant." Ahart v. State, 732 S.W.2d 256, 257 (Mo. Ct. App. 1987); see also Thomas v. State, 605 S.W.2d 792, 794-95 (Mo. 1980) (en banc); Rice v. State, 585 S.W.2d 488, 493 (Mo. 1979) (en banc); Smith v. State, 652 S.W.2d 134, 134 (Mo. Ct. App. 1983); Kearns v. State, 583 S.W.2d 748, 750 (Mo. Ct. App. 1979). In its last version (before being repealed in favor of Rule 29.15 in February 1987), Rule 27.26 declared that an evidentiary hearing was to be held "if issues of fact are raised in the motion." Rule

[12]The Missouri Supreme Court specified that the remedy had to be tailored to the nature of the abandonment; here, the nature of the abandonment dealt with the *timing* of Petitioner's postconviction motions, not their *content*. White II, 873 S.W.2d at 598-99. The Missouri Supreme Court never held that Petitioner's postconviction counsel abandoned him (as that concept is defined in Missouri law) in any respect other than the timing of the motion's filing.

27.26(e). In addition, Rule 27.26(c) declared that the motion "must be submitted on a form substantially in compliance with the form appended" to the Rule, and Part 9 of the form requires the petitioner to "[s]tate concisely . . . the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts." Similar language appeared in Rule 29.15(b). Cf. White III, 939 S.W.2d at 893. The Court thus concludes that the need to plead facts in a postconviction petition was well-established prior to the adoption of Rule 29.15, and the language of Rule 29.15 is similar language to the language from Rule 27.26 that originally gave rise to the judicial holdings requiring facts to be plead. The Court rejects Petitioner's argument that this pleading requirement was novel or not regularly followed.

III. PETITIONER'S ENTITLEMENT TO A HEARING

Petitioner is not entitled to a hearing on his claims for relief.

> A habeas corpus petitioner is entitled to an evidentiary hearing on the allegations contained in the petition if: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the statecourt [sic] hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Williams v. Clarke, 40 F.3d 1529, 1543 (8th Cir. 1994), cert. denied, 514 U.S. 1033 (1995) (quotation omitted). Stated more succinctly, "a habeas petitioner is entitled to an evidentiary

hearing in federal court if the petition alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." Toney v. Gammon, 79 F.3d 693, 697 (8th Cir. 1996). However, a hearing is not required with respect to those claims that are procedurally defaulted or that are clearly without merit. E.g., Zeitvogel v. Delo, 84 F.3d 276, 281-82 (8th Cir.), cert. denied, 117 S. Ct. 368 (1996); Toney, 79 F.3d at 697; Wilson v. Kemna, 12 F.3d 145, 146 (8th Cir. 1994). Most of Petitioner's claims have been procedurally defaulted; the remaining claims can be addressed based on the record already developed by the state courts.

IV. SUBSTANTIVE CLAIMS FOR RELIEF

A. Ineffective Assistance of Trial Counsel:[13] Voir Dire, Part I

Petitioner contends that his trial counsel was ineffective based on his performance during voir dire. In summary, Petitioner complains that trial counsel allowed the prosecutor to "completely dominate the voir dire" and asked very few questions. As a result, trial counsel allegedly missed opportunities to ferret out grounds for challenging jurors for cause or to rehabilitate them in the face of the prosecutor's challenges and educate the jury about the death penalty and Petitioner's theory of defense. Petitioner does not contend that his jury was biased; instead, he argues that he was prejudiced because the jury that decided his case was "prosecution oriented."

The first and foremost reason for rejecting Petitioner's argument is that it was largely procedurally defaulted and there are no grounds for excusing the procedural default. See White

[13]Robert Duncan was lead trial counsel, and John O'Connor was his second chair. Unless otherwise indicated, the term "trial counsel" is intended to refer to both attorneys.

III, 939 S.W.2d at 900. This, alone, justifies rejection of Petitioner's argument without further discussion.[14]

One narrow issue included within this claim was not defaulted: Petitioner's claim that trial counsel was ineffective for failing to rehabilitate Venireman Danny Robertson, who was eventually struck for cause. A claim of ineffective assistance of counsel is analyzed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). "This standard requires [Petitioner] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.'" Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995), cert. denied, 517 U.S. 1214 (1996) (quoting Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," Strickland, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Id. at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's

[14]Nonetheless, the Court notes that the record demonstrates that trial counsel's decision was the product of a conscious decision to avoid overemphasizing the fact that this was a death penalty case. T.TR. at 7. Petitioner ridicules this tactic, but it is not so absurd as to violate trial counsel's constitutional obligation to provide effective assistance at trial. Furthermore, Petitioner is unable to demonstrate that the composition of his jury would have been any different had trial counsel acted differently. Cf. Kilgore v. Bowersox, 124 F.3d 985, 994 (8th Cir. 1997), cert. denied, 118 S. Ct. 2352 (1998).

> unprofessional errors. the result of the proceeding would have been different.'" Lawrence, 961 F.2d at 115 (quoting Strickland, 466 U.S. at 694).

Id. Failure to satisfy both prongs is fatal to the claim. see Pryor v. Norris, 103 F.3d 710, 713 (8th Cir. 1997) (no need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness").

In order to properly evaluate Strickland's prongs, the law regarding disqualification of jurors must be considered. A juror is to be disqualified if that "juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quotation omitted). This standard "does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id. Finally, "the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind [and] such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Id. at 428. Consequently, the state court's factual determination regarding a potential juror's views is entitled to deference from this Court. Id.

Petitioner does not challenge the trial court's decision to strike Robertson, and based on Robertson's statements during voir dire such an effort would be futile. Robertson approached the bench and told the trial judge

> Well, I'm having some problems here kind of dealing with this. I always prided myself on being able to make decisions. That's all I do at work. But to decide

> possibly whether another human being might be put to death, I'm going to have some real problems with that, just my own emotional well being.

T.Tr. at 206. After Robertson finished discussing his personal difficulty with being on the jury, the trial judge asked him if he "could consider the full range of punishment," to which Robertson replied "I always thought I could until today, and I don't think I could." T.Tr. at 207-08. After Robertson and the other jurors left the courtroom, the prosecutor and the judge had the following exchange:

> Prosecutor: I just wanted the record to reflect that [Robertson's] demeanor was visibly shaken, something that doesn't come across on the record. But it was clear that the thought of being on this jury was deeply, deeply troubling to him.
>
> The Court: I observed that as well. His eyes were misty and his face was - his lips were quivering, and he was very nearly becoming emotionally distraught, I think, about the prospect of serving in a death case, and that was the reason the Court sustained the State's motion.

T.Tr. at 210-11. Petitioner does not suggest what, if anything, his trial counsel could have done or said to alter Robertson's inevitable removal for cause, and thus fails to demonstrate any possible basis for concluding that trial counsel's performance was constitutionally deficient. In addition, Petitioner's allegation of prejudice is too speculative to credit.

B. Informing Jurors About the Governor's Power to Pardon

Petitioner contends the trial court violated commands of the United States Supreme Court when it told potential jurors that the Governor could pardon Petitioner. Specifically, the trial court made the following statements during small-group voir dire:

> But I guess the ultimate question is, is if the defendant is found guilty could you consider as a possibility the death penalty as a range of punishment? The range of punishment if he's found guilty of first degree murder, the range of punishment is life imprisonment without parole unless he's pardoned by the governor, or death. That's the range. And could you consider the full range of punishment?
>
> * * *
>
> If the jury finds the defendant guilty of murder in the first degree, the only possible sentences are death and life imprisonment without parole except by pardon by the governor.
>
> Would you be able to consider both of these possible punishments?
>
> * * *
>
> If the jury finds the defendant guilty of murder in the first degree after all the evidence is presented, then the possible sentences, the only possible sentences, are death or life imprisonment without possibility of release unless the governor pardons the defendant. Would you be able to consider both of those possible punishments, death and life imprisonment without release? That's the question.
>
> * * *

> If the jury finds the defendant guilty of murder in the first degree, the only possible sentences are death and life imprisonment without possibility of release except by order of the governor. Would you be able to consider both of these punishments after such a verdict of guilty?

T.Tr. at 207, 243, 285, 304-05. Petitioner contends these statements violated Caldwell v. Mississippi, 472 U.S. 320 (1985), which prohibits tactics, comments or instructions that minimize the jury's "truly awesome responsibility" in death penalty cases. As summarized by the Court, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

In a case predating Caldwell, the Supreme Court held that a jury could be told of the possibility that a defendant's life sentence could be commuted. California v. Ramos, 463 U.S. 992, 1001-06 (1983). The Caldwell Court specifically adhered to Ramos, citing the "valid sentencing need to give more information on the Governor's power to commute life sentences," which Ramos held bears on the appropriateness of a life sentence. Caldwell, 472 U.S. at 337; see also Caldwell, 472 U.S. at 335-36. In light of these distinctions, the Eighth Circuit has already rejected an argument very similar (if not identical) to the one Petitioner now advances. Bannister v. Armontrout, 4 F.3d 1434, 1444 (8th Cir. 1993), cert. denied, 513 U.S. 960 (1994). Petitioner's second point is rejected.

C. Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection

Petitioner contends that his trial counsel provided ineffective assistance when he failed to object to the Court's

statements described in Part IV.B. supra. As explained earlier, the trial court's comments did not violate Caldwell, so the failure to object could not have prejudiced Petitioner.

D. Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror

After the Petitioner rested his case in chief, but before final instructions were read, the bailiff brought a matter involving one of the jurors (Ruth Tuggle) to the trial court's attention. The bailiff related her observations in open court with Petitioner (but not the jury) present:

> The juror, Mrs. Tuggle, has expressed her desire to hurry the deliberation. She's asked twice at least in the past 24 hours whether it lasts very long. She several times has discussed murders and brought up the case about Ted Bundy being murdered, and he deserved what he got.
>
> There's some concern as to whether she's really paying attention. She doesn't seem quite with it. The other jurors also feel that maybe she's not, or it's hard communicating with her.
>
> I've told her the rules of being a sequestered juror, watching the TV news, what program[s] she can or can't watch, and she just doesn't see[m] to be able to follow those instructions.

T.Tr. at 1026. Petitioner's counsel then asked Petitioner whether it was his desire to keep Tuggle on the jury, and he declared that it was. T.Tr. at 1026.

Petitioner now contends that his attorney was constitutionally ineffective for failing to seek Tuggle's removal.

This claim of ineffective assistance was not presented in either his pro se 29.15 Motion[15] or the First Amended 29.15 Motion, nor was it raised on appeal to the Missouri Supreme Court. The claim has been procedurally defaulted and there is no basis for overcoming the procedural bar, so it must be rejected.

E. Right to Fair and Impartial Jury

Relying on the same facts described in Part IV.D, supra. Petitioner contends that allowing Tuggle to remain on the jury violated his right to a fair and impartial jury. Tuggle's inclusion on the jury was not objected to at trial and was not raised on direct appeal and therefore has been defaulted. Petitioner cannot rely on his attorney's failure to object as cause and prejudice because that claim of ineffective assistance was itself procedurally defaulted, as discussed in Part IV.D, supra. See Oxford v. Delo, 59 F.3d 741, 747 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996) ("the performance of trial counsel is irrelevant to the cause [and prejudice] inquiry where the petitioner fails to raise the ineffective assistance of trial counsel claim in state court proceedings.").

F. Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause

Following general voir dire, the trial court questioned the panel in small groups consisting of five panel members in order to assess their ability to fairly consider both of the possible punishments in the event Petitioner was found guilty of first degree murder. During this stage, Venireman Layson initiated a discussion demonstrating his concern as to what would

[15]White III discussed claims raised on appeal that were previously raised only in Petitioner's pro se 29.15 Motion. Most of those claims failed to satisfy the pleading requirements, but the fact that they were discussed suggests that the Missouri Supreme Court was willing to consider the arguments if they had been properly pleaded.

happen if the jury found Defendant guilty of second degree murder, and whether there would still be a need for a penalty phase in the trial. He also indicated that he did not believe the prosecutor was being completely truthful because the prosecutor was not mentioning the possibilities of acquittal or conviction on a lesser offense. T.Tr. at 373-78. The prosecutor moved to strike Layson for cause because he indicated a bias against the prosecutor and because he appeared likely to draw upon and share "extrajudicial knowledge" with the other jurors. The trial court agreed, saying it would "strike him for cause because I think he presents a danger not only to the State, I think also to the defendant, if he's a loose gun." T.Tr. at 389. The judge approved the prosecutor's request to excuse Layson immediately so as to prevent him from talking to the other members of the panel. T.Tr. at 390, 400-01. Petitioner's trial counsel objected to the removal and raised the issue in his Motion for New Trial. However, the issue was not raised on direct appeal, giving rise to the instant claim.

The Sixth Amendment guarantee of effective assistance of counsel applies on direct appeal. Because of Strickland's strong presumption that there is a wide range of reasonable professional conduct "and the reality that effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment does not require that appellate counsel raise every colorable or nonfrivolous issue on appeal. Absent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Roe v. Delo, No. 97-4078, slip op. at 4 (8th Cir. Oct. 30, 1998) (citations and quotations omitted). In evaluating the failure to include this issue on appeal, as well as the prejudice to Petitioner for that failure, the Court must consider the legal analysis that would have applied to the claim. In light of the low level of scrutiny accorded to a trial judge's decision that a potential juror is biased, see Part IV.A, supra, counsel's decision not to raise the issue on appeal cannot be faulted. Moreover, the Court sees

nothing in the record that would have justified second-guessing the trial court's decision, particularly after considering the deference with which that decision would be reviewed.

G. Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror

During the small-group voir dire, Venirewoman Brison (who was number 33 on the panel) discussed her concerns and hesitations about voting in favor of the death penalty. T.Tr. at 276-77, 284. The prosecutor's motion to strike her for cause was denied. T.Tr. at 289-91. Petitioner contends that the prosecutor "slipped" her onto a list of jurors who had been removed for cause, and his trial counsel's failure to remedy this error constituted ineffective assistance of counsel.

This claim of ineffective assistance was not presented in either the pro se 29.15 Motion or the First Amended 29.15 Motion, and has therefore been procedurally defaulted.[16] Moreover, the claim was not raised on appeal to the Missouri Supreme Court. There being no basis for overcoming the procedural bar, the claim must be rejected.

Apart from the procedural problem, the Court notes that Petitioner has improperly and unfairly described the prosecutor's actions. The relevant portion of the transcript reflects the following discussion:

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[16]For that matter, this argument is not raised in the Second Amended 29.15 Motion that the Missouri Supreme Court refused to consider as improper under state rules. Therefore, even if the Missouri Supreme Court "should have" considered the second motion (an issue the Court has already ruled is beyond its power to adjudicate, see Part II.C, supra), the issue would still have been defaulted.

Prosecutor #1: Judge, we have enough, if we want *to save* a bunch of time, I think both parties would agree we could excuse - I think there were eleven, is that right?

Prosecutor #2: Eleven people on sequestration

Prosecutor #1: That should take us down to 40 [venirepersons].

The Court: Well, if we're going to do that by agreement I have no objection to that. So if I have the right list, that's [venirepersons] 23, 25, 27, 20, 46, 33, 69, 45, 73, 90 and 92.

Prosecutor # 1: That's what our numbers show.

Prosecutor # 2: I think it's 42, Judge.

The Court: That's what I started to question. That looks more like a 4 than it does a 9. Yes, Carder. I had the name down. 42. Well, I'm not going to do that unless it's by agreement.

Defense Counsel: I'm just checking, Judge. I'll agree to it.

The Court: Do you understand, Mr. White.

Defendant: (nods head).

The Court: You have no objection to it?

Defendant: No, sir.

Tr. at 493-94. This discussion demonstrates that this list was not offered as a list of potential jurors that had been struck for cause; it was a list of jurors the two sides mutually agreed could be struck. The Court made clear that absent the agreement, these jurors would not be struck. (Interestingly, the fact that Defendant's trial counsel made the agreement was itself offered as a ground for relief in the Second Amended 29.15 Motion. See L.F. at 28.).[17] Finally, the prosecutor did not "slip" Brison onto a list of jurors who had been struck for cause because *nobody* on this list was struck for cause. See T.Tr. at 245-50, 273-74, 291-92, 307, 321, 340-41, 365, 384, 389, 401, 413-14, 434, 444 (portions of transcript referencing jurors who were struck for cause). The Court thus concludes that even if this claim were not procedurally defaulted, it would be denied because it lacks merit.

H. Ineffective Assistance of Trial Counsel: Voir Dire, Part II

In this claim of ineffective assistance of counsel vis-a-vis voir dire, Petitioner contends his trial attorney failed to "question jurors on their views about a number of issues that would come up during the case, including witness identification and misidentification, graphic photograph and crime-scene details, and drug use." As with Petitioner's first claim regarding ineffective assistance during voir dire, see Part IV.A, supra, this claim was procedurally defaulted when Petitioner failed to satisfy the state pleading requirements for obtaining a hearing on this issue, so the claim is procedurally defaulted.

I. Ineffective Assistance of Trial Counsel:

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[17] Separate Legal Files (indicated by "L.F. at __") were created each time this case was remanded to the trial court. The Court's references to the Legal File will be to the one bearing Number 78459, which is the case number for White III and appears as Respondent's Exhibit BB in this Court's file.

Failure to Investigate and Introduce Evidence of Innocence

Petitioner contends that his attorney was ineffective for failing to introduce evidence of his innocence. Much of the evidence Petitioner refers to on this point was already discussed in Part II.A, supra. In addition, Petitioner finds fault with counsel in the following respects:

1. During the crime, Buckner told suspect two that Ernest Black was Earl Black's brother, which suspect two acknowledged. Petitioner contends that had counsel talked to Earl Black, he would have learned that Earl Black does not know Petitioner.
2. Counsel failed to interview Steve Rambo (Buckner's roommate), who owned a blue van similar to the one described by Kinney and Black.
3. Counsel failed to interview Constantine.
4. Counsel failed to interview Wright's family members who reported seeing people "matching the descriptions of Suspect Two and Suspect Three watching their house after the crime."
5. Ben Kinney "saw black men he believed to be Jamaicans driving by his house in a van" but counsel never interviewed him.

Some of these matters were raised in the First Amended 29.15 Motion. There is no need to parse out those that were raised and those that were not because *none* were raised on appeal to the Missouri Supreme Court. Consequently, this claim has been procedurally defaulted.

J. Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence

Petitioner contends that his trial counsel provided constitutionally defective assistance during the penalty phase of

his trial when he failed to investigate, unearth, and introduce mitigating evidence. This issue was not raised in the pro se 29.15 Motion, First Amended 29.15 Motion or on appeal to the Missouri Supreme Court, and so has been procedurally defaulted.[18]

K. Eighth Amendment Violation: Lack of Mitigating Evidence

In an argument related to trial counsel's failure to present certain evidence in mitigation of the death sentence, Petitioner argues that he was abandoned[19] by counsel during the penalty phase of the trial. He further argues that imposition of a death sentence under these circumstances was tantamount to explicitly instructing the jury to ignore mitigating circumstances and thus violates the Eighth Amendment.

Petitioner's argument was not presented to the Missouri courts for consideration. In addition, Petitioner's argument - that an attorney's failure to introduce mitigating evidence constitutes a violation of the Eighth Amendment (as opposed to the Sixth Amendment) - requires creation of a new constitutional rule that cannot be announced in a habeas proceeding. Teague v. Lane, 489 U.S. 288, 316 (1989).

L. Trial Counsel's Conflict of Interest

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[18]This issue also was not raised in the Second Amended 29.15 Motion. See footnote 13, supra.

[19]Lest there be any confusion, it must be pointed out that in arguing his attorney abandoned him, Petitioner does not suggest that was unrepresented during the penalty phase. The prosecutor introduced documents reflecting Petitioner's criminal history, then both sides presented closing argument. T.Tr. at 1054-55.

At various points during the trial. trial counsel asked Petitioner to endorse or acknowledge certain decisions made with respect to his defense. The topics in question included:

1. O'Connor would be assisting in the case, T.Tr. at 4-5
2. the decision not to call an eyewitness identification expert, T.Tr. at 5-6
3. the decision to "de-emphasize" the death penalty during voir dire, T.Tr. at 7
4. Petitioner never told trial counsel that he suffered from any mental problems, T.Tr. at 7-8
5. he was satisfied with the representation he had received to that point, T.Tr. at 8-9.
6. he had no problem with letting the judge re-read an instruction to the jury, T.Tr. at 926-27
7. he understood his right to testify and chose not to exercise that right, T.Tr. at 1011-15
8. certain witnesses would not be called, T.Tr. at 1015-16
9. lesser included offense instruction would not be requested, T.Tr. at 1016-18
10. the risks associated with calling witnesses to offer mitigating evidence, T.Tr. at 1032-34
11. he understood his right to testify during the penalty phase and chose not to exercise that right, T.Tr. at 1047-51

Petitioner challenged these actions in his initial, pro se 29.15 Motion; in doing so, he couched his argument in terms of ineffective assistance of counsel. L.F. at 11. Petitioner now contends that the Missouri Supreme Court should have considered this claim as one asserting a conflict of interest and should have applied Cuyler v. Sullivan, 446 U.S. 335 (1980) instead of Strickland.

The argument was not raised as a claim of conflict of interest in state court, so the claim has been defaulted.

> In order to present a habeas claim to the state court, a prisoner must "fairly present" not only the facts, but also the substance of his federal habeas corpus claim. In this circuit, to satisfy the "fairly presented" requirement, [a petitioner is] required to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in the Missouri state court.

Abdullah v. Groose, 75 F.3d 408, 411-12 (8th Cir.), cert. denied, 517 U.S. 1215 (1996). Petitioner never contended that the actions described above constituted a conflict of interest, nor did Petitioner cite or make any other reference to Cuyler, so Petitioner never fairly raised this issue in state court.

In any event, the Court doubts that this claim has any merit. Placing a criminal defendant on the stand to confirm his or her understanding of and acquiescence in his rights and strategic decisions about his case does not place the attorney at odds with his client. Moreover, criminal defendants are frequently questioned to insure they understand their right to testify on their own behalf and that the decision to (or not to) testify belongs solely to them. Although the questioning of Petitioner went beyond this issue, the Court does not believe that asking such questions constitutes a conflict of interest between attorney and client.

M. Ineffectiveness of Appellate Counsel: Myriad of Claims

Within this single claim, Petitioner alleges his Appellate Counsel provided ineffective assistance by failing to raise fourteen distinct claims of ineffective assistance of trial counsel. Claims of ineffective assistance of trial counsel are to be asserted in a postconviction proceeding. As discussed in Part I.B. supra, Petitioner's postconviction proceeding was governed

by Missouri Rule of Criminal Procedure 29.15, which at that time[20] was "a complicated, hybrid scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of postconviction relief." Lowe-Bey v. Groose, 28 F.3d 816, 818 (8th Cir.), cert. denied, 513 U.S. 1061 (1994). "Following the filing of a Rule 29.15 motion, the defendant litigates his or her Rule 29.15 claims through the sentencing court while the direct appeal is held in abeyance. If the sentencing court denies Rule 29.15 relief, a separate notice of appeal must be filed in the sentencing court if the defendant desires to appeal issues raised in the 29.15 motion." Id. at 819. The two appeals are consolidated into a single "hybrid" appeal, but "Rule 29.15 contemplates that the direct appeal and the 29.15 appeal retain their independent identity even though consolidated." Id.

A consequence of the separate appeals retaining their individual character is that the obligation to pursue an appeal from the 29.15 ruling rests with postconviction counsel, not appellate counsel. "No Missouri rule of appellate procedure or criminal procedure relieves post-conviction relief counsel of his or her duties before the time arrives for filing the notice of appeal challenging the denial of Rule 29.15 relief." Id. This is true even though the same attorney is performing a dual role: appealing issues in the direct appeal *and* appealing issues raised in the 29.15 proceeding. Petitioner is not entitled to effective assistance of counsel in a postconviction proceeding, Coleman v. Thompson, 501 U.S. 722 (1991), and therefore is not entitled to effective assistance of counsel in an appeal from the postconviction proceeding. Lowe-Bey, 28 F.3d at 819-20. Thus, when the appellate counsel is performing his function of appealing issues from the 29.15 proceeding, there is no Sixth Amendment protection; the Sixth Amendment only applies to

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[20]Rule 29.15 was amended effective July 1, 1997; the amended version does not apply to Petitioner. Rule 29.15(m).

the attorney's performance with respect to issues arising from the direct appeal. In this claim, Petitioner attacks his appellate counsel's performance in his 29.15 appeal role, not his direct appeal role; there being no constitutional guarantee of effectiveness for the former role, Petitioner's claim is not cognizable.

N. Due Process Violation: Abandonment by Postconviction Counsel

This argument is similar to one advanced by Petitioner as grounds for excusing procedural default, and was addressed in Part II.C, supra. To the extent that the argument relies on the Fourteenth Amendment instead of the Sixth Amendment, granting relief requires creation of a new constitutional rule and the Teague bar applies.

O. Due Process: Pleading Requirements

Petitioner attacks the Missouri Supreme Court's determination that his First Amended 29.15 Motion was insufficient under state law to secure him a hearing, and contends the holding was new and applied for the first time in this case. The Court doubts this issue is cognizable because it involves interpretations and application of state law. In any event, the Court rejects Petitioner's argument. See Part II.D, supra.

P. Due Process: Rule 29.15's Deadlines

Petitioner contends that his Due Process rights were violated by Rule 29.15's strict deadlines. This argument has previously been rejected by the Eighth Circuit. Kilgore v. Bowersox, 124 F.3d 985, 993 (8th Cir. 1997), cert. denied, 118 S. Ct. 2342 (1998); Sloan v. Delo, 54 F.3d 1371, 1379-80 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996).

Q. Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams

Petitioner alleges that his trial counsel failed to interview his sister and call her as a witness at trial. Petitioner did not raise the former issue in either his pro se 29.15 Motion or his First Amended 29.15 Motion[21] and is now procedurally barred from raising the issue. (Besides, in the affidavit she supplied for the Appendix, Williams avers that she did speak with Petitioner's trial counsel). In his pro se 29.15 Motion, Petitioner alleged that his trial counsel was ineffective for failing to call Williams as a witness, but the claim was unreviewable because he did not satisfy the pleading requirements. White III, 939 S.W.2d at 899. Consequently, this claim has been defaulted.

R. Ineffective Assistance of Trial counsel: Failure to Give an Opening Statement at the Beginning of Trial

The prosecutor delivered an opening 'statement prior to the introduction of evidence. T.Tr. at 503-30. Petitioner's trial counsel reserved his opening statement, T.Tr. at 530, and delivered one after the state rested. T.Tr. at 996-98. In this claim, Petitioner attacks both the content and the timing of his attorney's opening statement. This claim was not raised in the First Amended 29.15 Motion or presented to the Missouri Supreme Court, so the claim has been defaulted.

S. Ineffective Assistance of Trial Counsel: Failure to Hire an Expert

Petitioner contends his trial counsel was ineffective for failing to hire an expert to testify that those who use crack

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[21]This issue also was not raised in the Second Amended 29.15 Motion. See footnote 16, supra.

cocaine - such as Kinney and Black - suffer damage to their ability to perceive and remember events. The issue was raised in Petitioner's pro se 29.15 Motion, L.F. at 17, but failed to satisfy Rule 29.15's pleading requirements. Consequently, the Missouri Supreme Court refused to review the issue, White III, 939 S.W.2d at 898-99, and the claim is procedurally defaulted.

T. Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances

Petitioner contends that the prosecutor gave insufficient notice of its intent to submit the aggravating circumstances reflected in Instructions 13 and 14 to the jury. Petitioner basis this argument on "Mo. Rev. Stat. § 565.005, due process under the Fourteenth Amendment and freedom from cruel and unusual punishment under the Eighth Amendment." He also contends that two of the instructions were vague. The first permitted the jury to find an aggravating circumstance because Petitioner and his cohorts purposely left gas stove's burners on and blew out the pilot light, thereby "created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. . . ." The second allegedly vague instruction asked the jury to consider whether Wright's murder "involved torture, and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman"

Petitioner's arguments have been procedurally defaulted because they were not presented to the Missouri Supreme Court and were not raised in his pro se or First Amended 29.15 Motions. Even if the instructions were unconstitutionally vague, Petitioner could not satisfy Strickland's prejudice prong because Missouri is a "nonweighing" state, meaning that "a finding of at least one aggravating circumstance is a threshold requirement to imposing a death sentence." Sloan, 54 F.3d at 1386. As long as the jury validly found at least one aggravating circumstance,

an improper instruction is of no consequence. Here, the jury found additional statutory aggravating factors (e.g., that Petitioner had prior felony convictions, that the murder was committed while other crimes (other attempted murders) were being committed, and that the murder was committed in connection with a robbery). Direct Appeal Legal File at 17-18. Assuming an uncured unconstitutional vagueness in the instructions, "[t]he jury's penalty phase verdict is... reliable despite the unconstitutionally vague instruction on the other aggravating factor, and the use of that instruction was harmless." Id.; see also Ramsey v. Bowersox, 149 F.3d 749, 754 (8th Cir. 1998). Therefore, there was no prejudice from trial counsel's failure to object to these instructions.[22]

U. Ineffective Assistance of Trial Counsel: Failure to Object to the Videotaped Lineup

Petitioner contends that when Petitioner was placed in a videotaped lineup on May 26, 1987, he was in jail awaiting trial on an unrelated robbery charge. He alleges that his attorney in the robbery case was not contacted prior to the lineup, and his trial counsel in this case was ineffective for failing to object to the use of the lineup for this reason. Petitioner presented the Missouri courts with several arguments regarding the various lineups administered in this case, but he never raised this challenge.[23] Accordingly, the claim is procedurally defaulted.[24]

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[22]Trial counsel lodged a general objection to the instructions, T.Tr. at 1031; whether this was sufficient to preserve any issues for appeal is an issue that need not be decided because the issue was never pursued on appeal.

[23]In his Second Amended 29.15 Motion, Petitioner challenged a different lineup on these grounds. L.F. at 32. Thus, even if the Missouri Supreme Court "should have" considered the Second Amended 29.15 Motion, this claim would still have been defaulted.

[24]In addition, the claim lacks merit. See Part IV.Z, infra (discussing Moore v. Illinois 434 U.S. 220 (1977)).

V. Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson

Petitioner contends his trial attorney was ineffective for failing to impeach Detective Gibson with evidence that he had committed "improper actions" in prior cases. Petitioner never presented this argument to any Missouri court, so the claim has been defaulted.[25]

W. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Use of Peremptory Challenges and Certain Strikes for Cause

Petitioner contends that the prosecutor utilized peremptory challenges to eliminate five jurors who had "conscientious scruples" against the death penalty and six jurors who expressed difficulty believing witnesses who used illegal drugs. He also claims that his trial counsel failed to object to two of the prosecutor's requests to strike jurors for cause. None of these arguments were raised on appeal to the Missouri Supreme Court, so they have been defaulted.

In addition, the Court notes that Petitioner's first claim is barred by Teague. The use of strikes in this manner is not barred by Batson v. Kentucky, 476 U.S. 79 (1986), and Petitioner would require a new constitutional rule in order to demonstrate that he was prejudiced by the failure to object. The Court cannot find prejudice absent a rule prohibiting the prosecutor's use of strikes for these reasons, and it cannot create the rule in light of Teague.

X. Ineffective Assistance of Trial Counsel:

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[25]This claim also was not included in the Second Amended 29.15 Motion. See footnote 16. supra.

Failure to Object to Prosecutor's Closing Argument During Penalty Phase

Petitioner argues that various aspects of the prosecutor's penalty phase closing argument were improper, and his trial counsel was ineffective for failing to object. Petitioner failed to raise this argument in state court with sufficient specificity to permit review. White III, 939 S.W.2d at 902. Petitioner's failure to satisfy the state pleading rule constitutes a procedural default.

Y. Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver

During cross-examination, Petitioner's trial counsel asked Detective Gibson whether he read Petitioner his rights prior to interviewing him. He also established that Petitioner was willing to talk with Detective Gibson and did not ask for a lawyer. T.Tr. at 775-76. On redirect, the prosecutor asked whether Detective Gibson had asked Petitioner to sign a waiver of his Miranda rights; Detective Gibson said that he had. T.Tr. at 784. Petitioner's trial counsel then approached the bench to object; after the trial court forced him to assert a ground for his objection, he declared "it's irrelevant, it's immaterial, and the fact he signed a consent form has nothing to do with it because he talked to them." T.Tr. at 785. This objection was overruled. Upon resumption of the redirect examination, Detective Gibson reaffirmed that he had asked Petitioner to sign a waiver form and he refused to do so. T.Tr. at 786.

Petitioner contends his appellate counsel was ineffective for failing to challenge this testimony on the grounds that it constituted an infringement on Petitioner's constitutional right to remain silent. The problem with this argument is that trial counsel did not make a constitutional objection; he objected on the basis of relevance. The issue Petitioner claims his appellate counsel should have raised was not preserved at trial and would

have been reviewed only for plain error if raised on appeal. As stated in Part IV.F. supra, "[a]bsent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Roe, No. 974078, slip op. at 4 (quotations omitted). "The decision to forgo a plain error claim is usually the result of a reasonable winnowing of weaker appellate claims. Therefore, we rarely conclude that an appellate attorney's performance was constitutionally deficient for not raising such a claim." Id. There is no "contrary evidence" present in this case.[26]

Z. Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's In-Court Identification of Petitioner

During his direct examination, Black testified that he was shown approximately four videotape lineups in September 1987; he was unable to positively identify anyone in those lineups. T.Tr. at 880. On the Saturday before trial, he was shown two videotapes, T.Tr. at 880-81, and was prepared to testify that one of the men was (or at least appeared to be) the man who slashed Wright's throat. The tape in question had been shown to Black in September 1987. T.Tr. at 883, 892-93. On the Monday the trial started, prosecutors spoke with trial counsel and told him that Black had identified Petitioner as the man who entered with Buckner. Trial counsel misunderstood the prosecutor and thought he meant that Black had positively identified Ford (who was also in the lineup). T.Tr. 881-82, 884. Ultimately, the trial court overruled an objection based on the

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[26]Moreover, the Court doubts that the testimony was a comment on Petitioner's right to remain silent, given that he clearly surrendered that right when he agreed to talk to Detective Gibson. In fact, trial counsel conceded as much. T.Tr. at 784. Petitioner insinuates that the questions were designed to comment on his decision not to testify at trial, but the Court does not believe this is a fair interpretation of the record.

timeliness of the prosecutor's disclosure - the only objection made at trial on this matter. T.Tr. at 884-86.

Petitioner now contends that his appellate counsel was ineffective for failing to challenge Black's identification. However, he does not contend that his appellate counsel should have raised an issue about the timeliness of the disclosure. Instead, he claims his appellate counsel should have argued that the video was unduly suggestive based on its contents and Black's "repeated exposure" to it. He also argues that appellate counsel should have raised a claim based on the fact that trial counsel was not permitted to be at the private screening held by the prosecutor None of these objections were made at trial and would have only been reviewed for plain error, so appellate counsel could reasonably refrain from raising them. Roe, No. 97-4078, slip op. at 4.

The Court also doubts these claims had serious merit. Black's viewings occurred approximately 16 months apart - hardly the repetitious showing Petitioner insinuates occurred. Petitioner contends that the lineup was suggestive because Petitioner was one of two people with beards and the only one in a "blue jail shirt" - but there is nothing in the record to support this purely factual assertion (primarily because he never asked the state courts to rule on the issue). Finally, the Supreme Court has held that "a pretrial corporeal identification conducted after a suspect has been indicted is a critical stage in a criminal prosecution at which the Sixth Amendment entitles the accused to the presence of counsel." Moore v. Illinois, 434 U.S. 220, 224 (1977). However, this right was not implicated here because Black was shown a videotaped array.

In United States v. Ash, 413 U.S. 300, (1973), the Court held that the Sixth Amendment does not require that defense counsel be present when a witness views police or prosecution photographic arrays. A photographic showing, unlike a

corporeal identification, is not a 'trial-like adversary confrontation' between an accused and agents of the government; hence, 'no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.' Id. at 317.

Id. at 227. The lack of merit associated with these claims further substantiates the presumptive reasonableness of appellate counsel's decision not to seek plain error review.

AA. Actual Innocence

In contrast to his earlier argument - where Petitioner asserted his actual innocence solely in an attempt to excuse his procedural defaults - Petitioner now presents his actual innocence as a substantive ground entitling him to relief. In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court pointed out that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Although actual innocence plays a role in habeas proceedings, it does so only as a supplement to a constitutional claim - not as an independent claim. Id. at 404. This distinction was emphasized in Schlup, a free-standing claim of actual innocence is governed by Herrera, whereas a claim of actual innocence used to demonstrate cause and prejudice to overcome a procedural bar to federal review is governed by a different standard (as later announced in Schlup). 513 U.S. at 315-17. The Court went on to explain the different standards as follows:

If there were no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [petitioner's] innocence. On the other

hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, [petitioner's] threshold showing of innocence would justify a review of the merits of the constitutional claims. Schlup, 513 U.S. at 317.

Subsequent Eighth Circuit opinions do not make clear whether Herrera completely bars free-standing claims based on actual innocence or whether, in light of Schlup, it merely erects an extremely high standard for such claims. Herrera was decided in 1993, and Schlup was decided in 1995. Four months after Schlup was decided, the Eighth Circuit cited it for the proposition that a free-standing claim of actual innocence is cognizable and relief can be granted only if the new facts "'unquestionably establish [the petitioner's] innocence.'" Allen v. Nix, 55 F.3d 414, 417 (8th Cir.), cert. denied, 516 U.S. 1014 (1995) (quoting Schlup, 513 S.Ct. at 317). Later, in Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996), the Eighth Circuit was again presented with a free-standing claim of actual innocence and, for that reason, explicitly declared that "reliance on Schlup is misplaced." 99 F.3d at 283. Instead, the Meadows Court relied on Herrera to hold that the "claim of innocence based on newly discovered evidence is not cognizable on habeas review." Id. Finally, in Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997); the Eighth Circuit relied on Allen and subjected a free-standing claim of actual innocence to the "unquestionable innocence" standard. 119 F.3d at 1334.

Resolution of Petitioner's claim is easy if the claim is not cognizable: if it is not cognizable, no relief can be granted. However, because the law in this circuit is not clear, it is prudent for the Court to consider Petitioner's claim under the standard described in Cornell and Allen. This, too is an easy matter: having failed to satisfy the lesser Schlup standard,

Petitioner cannot satisfy the higher standard described in Cornell and Allen.

BB. Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer

Petitioner claims that, while the jury was deliberating, the prosecutor offered to permit Petitioner to plead to second degree murder and receive a sentence of fifteen years. He claims that his trial counsel failed to discuss the plea offer with him, thereby failing to provide effective assistance. This claim was never raised in the state courts and has been procedurally defaulted.[27]

CC. Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel

On February 3 - the Friday of the first week of trial - Petitioner's lead trial counsel was not present at the start of the day's proceedings. The jury was not given any reason for his absence. T.Tr. at 707. The record does not reflect that he ever appeared at trial that day, and there is no indication he said anything on the record. The record does not reflect a reason for Duncan's absence; Petitioner offers an explanation, but the reason does not appear in the record.

Petitioner argues that lead trial counsel's absence constituted ineffective assistance of counsel. Petitioner did not raise this argument in his pro se 29.15 Motion

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[27]This claim was not raised in Petitioner's Second Amended 29.15 Motion. See footnote 16, supra.

or his First Amended 29.15 Motion (which explains why the reason for counsel's absence does not appear in the record)[28] and so the claim has been defaulted.[29]

DD. Judicial Bias During Postconviction Proceedings, Part I

Petitioner contends that the trial judge in his second 29.15 was biased against him. He bases this claim on the fact that the judge had an ex parte communication with the prosecutor about the scope of the Missouri Supreme Court's remand.

Respondent contends that this claim is not cognizable because it occurred during a postconviction proceeding. The Court is not convinced Respondent is correct, particularly in light of the absence of authority to support this proposition. Inherent in the concept that federal courts will defer to the findings rendered in a state postconviction proceeding is the understanding that those findings were rendered by an unbiased tribunal.

Petitioner's claim is easily disposed of on the merits. As succinctly explained by the Missouri Supreme Court:

> The judge's determination that White had not been abandoned was overturned by this Court on White's second appeal. Attempting to revive this conversation as an issue, White notes that the judge's original rulings on the first amended Rule 29.1 5 motion are still before this Court. This is true, but that judgment was rendered

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[28]In addition, Petitioner failed to raise this argument in his Second Amended 29.15 Motion. See footnote ___, supra.

[29]Moreover, to the extent Petitioner contends he was prejudiced simply because O'Connor conducted proceedings that day, Petitioner must independently demonstrate that O'Connor's performance fell short of the Sixth Amendment's requirements.

> on August 1, 1990, and the allegedly improper conversation occurred over one year later, in October or November of 1991. While we expect judges in this state to show foresight, it is a bit much to expect a judge to disqualify because of a conversation that is to occur more than one year in the future.

White III, 939 S.W.2d at 903. Assuming the claim is cognizable, it lacks merit.

EE. Judicial Bias During Trial

Petitioner has identified six incidents during trial that purportedly demonstrate that the trial judge was biased in favor of the prosecution. Petitioner did not raise this argument on direct appeal, so the claim has been defaulted.

FF. Judicial Bias During Postconviction Proceedings, Part II

Petitioner contends that the trial judge in his 29.15 proceeding demonstrated bias when he adopted the prosecution's findings of fact and conclusions of law verbatim. As stated earlier, the Court does not accept Respondent's argument that this claim is not cognizable. See Part IV.DD, supra.[30] However, as before, the merits are not in Petitioner's favor. The Court does not believe that the trial judge's actions demonstrate bias on the part of the judge. Moreover, the events occurred in connection with Petitioner's first 29.15 proceedings, the results of which were completely reversed by White I. Therefore, even if the judge's use of the prosecutor's proposed

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[30]The Court believes this claim has been procedurally defaulted, but Respondent has not raised this argument. At present, the law is unclear as to whether the Court can raise the issue *sua sponte*. See Trest v. Cain, 118 S. Ct. 478, 480 (1997). If it were clearly permissible to do so, the Court would raise the issue on its own and hold that the claim has been defaulted.

findings of fact demonstrated bias, any prejudice was eliminated.

GG. Ineffective Assistance of Trial Counsel: "Bad Loser" Comment

During small-group voir dire, one of the jurors related an event that occurred when he had served on a jury previously. He explained that following the verdict one of the lawyers told him that some of the State's witnesses had lied. He did not recall whether it was a prosecutor or defense attorney. T.Tr. at 417-18. A lengthy discussion (out of the jury's hearing) about the possibility that these comments poisoned the small group ensued. The trial judge struck three of the five potential jurors for cause, T.Tr. at 444, leaving only Venirepersons Benedict (# 87) and Ford (# 89). Benedict and Ford were returned for additional voir dire, T.Tr. at 454, and the prosecutor was permitted to explain that the incident "was an example of a defense attorney being a bad loser" and "that it certainly wasn't the prosecutor that said a witness lied, and that.., in fact wasn't the case." T.Tr. at 455. Petitioner contends that his trial counsel provided ineffective assistance in failing to object to these statements.

This argument was not raised on appeal and has been procedurally defaulted. In addition, the Court concludes it is impossible for Petitioner to demonstrate prejudice. After excluding those jurors who were struck for cause, peremptory strikes for the main panel were made against jurors with numbers under # 79. T.Tr. at 495-96. Benedict and Ford were candidates to be the second alternate, T.Tr. at 496, but both were struck peremptorily. T.Tr. at 499 (identifying jurors and alternates).

It is true that at the time of Petitioner's trial, Missouri law provided "that criminal defendants are entitled to a 'full panel of

qualified jurors before being required to make peremptory challenges' and that failure to sustain a meritorious challenge for cause is prejudicial error." Sloan, 54 F.3d at 1387 (quoting State v. Wacaser, 794 S.W.2d 190, 193 (Mo. 1990) (en banc)).[31] However, Petitioner cannot argue that his use of a peremptory challenge on either Benedict or Ford[32] constitutes prejudice under Strickland because none of the alternates were called upon to deliberate. T.Tr. at 1027-29 (jurors identified when polled at the end of the case). Thus, Petitioner was not prejudiced by the prosecutor's comments and the resulting "need" to use a peremptory to eliminate Benedict or Ford as a potential alternate.

HH. Ineffective Assistance of Postconviction Counsel, Part II

Petitioner again argues that he was deprived of his Sixth Amendment right to counsel in the postconviction proceedings. The argument is rejected. See Part II.B, supra.

II. Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims

Within this argument, Petitioner claims his appellate counsel should have raised the following grounds: "verdict directing instructional error, Brady violation by the state, challenges to the prosecution's guilt phase and penalty phase closing arguments." Some of these claims are discussed in greater detail elsewhere in this order. The argument regarding

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[31]Wacaser was legislatively overruled, but not until well after Petitioner's trial. Thus, at the time of his trial, Petitioner was entitled to a fully qualified, untainted jury upon which to exercise his peremptory strikes.

[32]Both were candidates to be the second alternate, and neither was chosen. Thus, it can be deduced that the prosecutor used his peremptory on either Benedict or Ford and Petitioner used one on the other.

the verdict director lacks merit, Part IV.LL, infra, so his claim of ineffective assistance of counsel must be rejected as well. Similarly, his Brady claim lacks merit, Part IV.KK, infra, so there could be no ineffectiveness in failing to raise the issue on appeal. Finally, Petitioner has not provided sufficient detail about the remaining portions of this claim to permit meaningful discussion (and, in any event, the Court notes that any appeal would have sought only plain error review).

JJ. Ineffectiveness of Trial Counsel: Failure to Request Mistrial During Prosecutor's Closing Argument

During his closing argument following the trial's guilt phase, the prosecutor told the jury that "if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended -" Supp. T.Tr. at 30.[33] Petitioner's trial counsel objected, and the trial court sustained the objection and instructed the jury to disregard the prosecutor's comment. Supp. T.Tr. at 32-33. Prior to the delivery of the cautionary instruction to the jury, Petitioner's trial counsel moved for a mistrial but also stated that "as a practical matter I don't want a mistrial." Supp. T.Tr. at 31-32. After the objection was sustained in open court, trial counsel approached the bench again and moved for a mistrial, and the motion was denied. Supp. T.Tr. at 33.

On direct appeal, Petitioner challenged the trial court's denial of the motion for mistrial. After recounting the circumstances described above, the Missouri Supreme Court held that "[u]nder these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. The defendant cannot complain about the denial of a

[33]This is a reference to the Supplemental Trial Transcript, which contains the prosecutor's closing argument.

mistrial when his counsel plainly told the court that he did not want this relief." White I, 813 S.W.2d at 866.

Petitioner does not challenge the denial of the mistrial; instead, he argues that his trial counsel's actions constituted ineffective assistance. This argument was not presented in Petitioner's pro se 29.15 Motion, First Amended 29.15 Motion or on appeal, and has been procedurally defaulted.[34]

KK. Ineffective Assistance of Appellate Counsel: Failure to Raise Claim Based on *Brady v. Maryland*

Relying on the assumption that Kinney and Black were shown photographs of White but did not identify him as one of the perpetrators, Petitioner contends his trial counsel should have raised a claim based on Brady v. Maryland, 373 U.S. 83 (1963). Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The obligation to produce extends to material impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985).

Petitioner did not raise this issue in his Motion for New Trial, so on appeal the claim would have been reviewed only for plain error. As stated earlier, the failure to raise a Claim that will be reviewed for plain error is presumptively reasonable. Roe, No. 97-4078, slip op. at 4. There is no basis for overcoming this presumption because there is no indication that the factual predicate to this claim is true: neither Kinney nor Black testified that they were shown Petitioner's photograph

[34]The issue also was not raised in the Second Amended 29.15 Motion. See footnote 16, supra.

prior to the occasions upon which they positively identified him. T.Tr. at 649-51, 662-63, 951.[35]

LL. Ineffective Assistance of Appellate Counsel: Verdict Director

Petitioner contends that Instruction 5 violated his due process rights because it improperly permitted the jury to convict him without finding all the elements of the crime. Instruction 5 incorporated accomplice liability theories and, in pertinent part, instructed the jury that if it found from the evidence beyond a reasonable doubt:

First, that on January 6, 1987, in the County of Jackson, State of Missouri, the defendant or another person or persons caused the death of Don Wright by asphyxiating, stabbing and cutting him, and

Second, that defendant or the other person or persons knew that his conduct was practically certain to cause the death of Don Wright, and

Third, that defendant or the other person or persons did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief, then you are instructed that the offense of murder in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the death of Don Wright, the defendant aided or encouraged another person or persons in causing the death of Don Wright

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[35]Petitioner's suggestion that Respondent conceded the merits of this claim before the Missouri Supreme Court is incorrect. Respondent's Brief before the Missouri Supreme Court at 34-35.

and reflected upon this matter cooly [sic] and fully, then you will find the defendant guilty of murder in the first degree.

Second Supplemental Legal File at 15-16.

In State v. Ferguson, 887 S.W.2d 585 (Mo. 1994) (en banc), the Missouri Supreme Court held that although a first degree murder conviction could be based on accomplice liability, the element of deliberation -- which distinguishes first degree murder from second degree murder -- must be attributed to the defendant. Ferguson explained that

> [u]nder State v. Ervin, 835 S.W.2d 905, 923 (Mo. banc 1992) [cert. denied, 507 U.S. 954 (1993)], and State v. O'Brien, 857 S.W.2d 212, 217 (Mo. banc 1993), the verdict directing instruction for first degree murder must ascribe the element of deliberation to the defendant specifically, even though the charge is premised on accessory liability. Although the conduct of a defendant may be imputed to a codefendant, the element of deliberation may not. O'Brien, 857 S.W.2d at 218. The rationale for this rule, though not expressly stated in Ervin or O'Brien, is that the failure to ascribe deliberation to the defendant relieves the State of its burden of proving the requisite mental state of the offense. An instruction that relieves this burden violates due process and constitutes error.

Ferguson, 887 S.W.2d at 587. It is clear that Instruction 5 does not violate Ferguson's commands. Instruction 5 establish a two-step process: in the first three elements, the jury was asked to determine whether a first degree murder had been committed but was not asked to assess criminal responsibility for that murder. Upon determining that a first degree murder had been committed, the jury was then required to consider the fourth element -- which was designed to determine if Petitioner could

be held criminally responsible for the first degree murder described in elements one through three. Element four clearly requires the jury to determine whether the Petitioner acted with the requisite deliberation; accordingly, Ferguson's commands were satisfied. In addition, the Eighth Circuit has affirmed a substantially similar instruction. Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998). There being no error, Petitioner was not prejudiced when his appellate counsel failed to raise this issue on appeal.

MM. Ineffective Assistance of Postconviction Counsel, Part III

In this claim, Petitioner asserts more instances of ineffective assistance of postconviction counsel. These claims are denied. See Part IV.B, supra.

NN. Ineffective Assistance of Trial Counsel: Former Prosecutor as Defense Attorney

Petitioner contends that O'Connor was Trial Director for the Jackson County Prosecutor's Office when Wright's murder was being investigated and when the indictment in this case was filed. He also speculates that O'Connor "reviewed the case and assigned it to Mr. Hall and Mr. Peters for trial. He also may have been involved in the decision to seek the death penalty." Prior to jury selection, Duncan asked Petitioner if he understood that O'Connor would be assisting in the case. He also indicated his understanding that O'Connor "until about a year ago was in the Prosecuting Attorney's Office" but that he had not reviewed Petitioner's case during his employment as a prosecutor. T.Tr. at 4-5.

Petitioner now contends that O'Connor's status as a former prosecutor constituted ineffective assistance of trial counsel. Petitioner did not raise this issue in the state courts, so the claim

has been defaulted and this Court cannot consider Petitioner's accusation that O'Connor reviewed his file when he was a prosecutor.

OO. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Opening Statement

During his opening statement, the prosecutor told the jury "Roger Buckner, this defendant Leamon White and Cleveland Ford entered into a conspiracy to rob Don Wright of that crack and entered further into a conspiracy to leave no witnesses to that robbery, to kill everyone present." T.Tr. at 505. The prosecutor also described Petitioner's efforts to hide Buckner after the crime as part of a "conspiracy." Petitioner contends that his trial counsel was ineffective for not objecting to these statements because there was no evidence supporting these claims. The Court disagrees. As the Missouri Supreme Court found, "[r]eview of the trial transcript refutes White's contention that no evidence supported the prosecutor's statement that White conspired with others. Evidence was adduced from which it may be inferred that White and his two accomplices perpetrated a planned robbery and murder. Here, the prosecutor's opening statement was not improper because it placed before the jury and the defense the State's theory of the case." White III, 939 S.W.2d at 902.

PP. Proportionality Review

Petitioner contends the Missouri Supreme Court failed to properly perform the proportionality review required by Mo. Rev. Stat. § 565.035. The fatal flaw in Petitioner's argument is that "[t]he federal Constitution of its own force, of course, requires no such review." Murray v. Delo, 34 F.3d 1367, 1377 (8th Cir. 1994), cert. denied, 515 U.S. 1136 (1995)(citing Pulley v. Harris, 465 U.S. 37 (1984)). Here, the Missouri Supreme

Court conducted the review required by state law, and a federal court cannot re-examine the issue or otherwise look behind the factors actually considered by the Missouri Supreme Court. This Court cannot "consider whether the [state] court misinterpreted the state statute. . . " Sweet v. Delo, 125 F.3d 1144, 1159 (8th Cir.), cert. denied, 118 S. Ct. 1144 (1997). Moreover, a federal court cannot "look behind [the state court's proportionality] conclusion to consider the manner in which the court conducted its review . . . ." Six v. Delo, 94 F.3d 469, 478 (8th Cir. 1996), cert. denied, 117 S. Ct. 2418 (1997) (quoted with approval in Sweet, 125 F.3d at 1159).

QQ. Ineffective Assistance of Trial Counsel: Wasting a Peremptory Strike

Petitioner contends that his trial counsel provided ineffective assistance when he "wasted" a peremptory strike on a prospective juror that had already been struck. The Missouri Supreme Court rejected this claim because Petitioner failed to allege how he had been prejudiced, White III, 939 S.W.2d at 900, and his failure to satisfy the state's pleading requirements constitutes a procedural default.

The Court also notes that the record belies Petitioner's factual assertions. The venireperson in question, Cassandra Hughes, was number 60 on the panel. She was questioned during small-group voir dire, T.Tr. at 352-53, and neither party asked that she be struck for cause. T.Tr. at 353-54. She was not listed among those whom the parties agreed to strike for cause. T.Tr. at 493-94 (discussion of panelists the parties mutually agreed to excuse). Her number was low enough to include her as a potential juror. T.Tr. at 496. While the attorneys were considering their peremptory strikes, Hughes reported that she had the flu and the trial court asked the parties to confirm their agreement that she could be sent home immediately. Although the parties agreed with the factual statement that she could be

excused, they did not agree that she would be struck for cause. Specifically, the prosecutor declared "[f]or now I think all we need to do is say that she's going to be excused because the defendant may end up striking her as one of their peremptories . . . ." T.Tr. at 498. The discussion then turned to the subject of the alternate jurors The prosecutor never agreed that Hughes could be excused for cause; instead, the participants were simply acknowledging defense counsel's intent to strike Hughes, thereby permitting Hughes to leave immediately instead of waiting in the jury room, sick with the flu, until she was later formally dismissed. None of Petitioner's peremptory strikes were "wasted."

RR. Right to Be Present at Critical Stages

Following his conviction, on March 2, 1989 Petitioner filed a Supplemental Motion for New Trial alleging that one of the jurors (Timothy Williams) "failed to reveal on voir dire examination. . . that his brother or other relative was a friend of and had gone to school with the victim, Don Wright." Direct Appeal Legal File at 39. A hearing was held on March 1, 1989,[36] but Petitioner did not attend the proceeding. The record contains no reason for his absence. The Motion (along with other post-trial motions) was denied on April 14, 1989.

Petitioner did not raise this issue in his initial appeal. He raised the issue for the first time in his brief in the third appeal to the Missouri Supreme Court. Keeping in mind that Petitioner's direct appeal was disposed of in White I, the court observed that "[p]lain error review may be considered 'on appeal.' Rule 84.13(c). This is not an appeal of White's

[36]There is no explanation as to how the motion was filed the day after the hearing; however, there is no denying the dates as they appear in the legal file and on the Transcript.

conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the post-conviction court 'clearly erred' in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible." White III, 939 S.W.2d at 904.[37] Consequently, the claim has been procedurally defaulted.

SS. Ineffective Assistance of Trial Counsel: Myriad of Claims

Within this single claim, Petitioner asserts several claims of ineffective assistance of trial counsel. He contends his attorney was ineffective for (1) failing to elicit helpful testimony from Ben Kinney, (2) failing to challenge suggestive pretrial identification procedures, (3) failing to effectively impeach Ernest Black and Carol Kinney, (4) failing to prepare for trial, and (5) eliciting a positive identification of Petitioner from Ernest Black. Petitioner failed to satisfy the state court's pleading requirements for proper presentation of the first four claims, see White III, 939 S.W.2d at 895-97, so they have been defaulted. As to the latter claim, the Missouri Supreme Court affirmed the trial court's finding that "counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before

[37]The Missouri Supreme Court also "assume[d] that the issue is raised as a motion to recall the mandate" and considered whether appellate counsel provided ineffective assistance for failing to raise the issue. White III, 939 S.W.2d at 904. Petitioner has not raised this issue in this forum, so there is no need to address it.

and at trial. At most, therefore. Black's response to counsel's questions was cumulative." White III, 939 S.W.2d at 898. This finding is supported in the record and is entitled to deference. E.g., Pryor, 103 F.3d at 712-13. In light of this finding. Petitioner cannot satisfy either of Strickland's prongs.

TT. Conflict of Interest, Etc.

In an argument very similar to the one presented in Part IV.L, supra, Petitioner contends that his attorney "was ineffective and had a conflict of interest" as demonstrated by his asking Petitioner to endorse strategic decisions in open court. These same actions are also faulted because they "disclosed privileged attorney-client communications and strategy decisions to the prosecutor and Court prior to and during trial." The Court's holding in Part IV.L applies here: these claims were not raised in the state courts and lack merit even if they had not been procedurally defaulted.

UU. Restriction on Cross Examination of Kinney

During trial, Petitioner's attorney attempted to impeach Kinney with police reports of her statements. The reports were not written by Kinney. The trial court disallowed the attempt because it was improper impeachment; they were not Kinney's statements, but rather the officers' statements. Counsel also tried to impeach Kinney with her deposition when she testified she could not remember certain facts. This attempt was also thwarted, given that the deposition did not contradict her trial testimony. Petitioner contends that these evidentiary rulings violated his rights under the Sixth and Fourteenth Amendments.

Ordinarily. an evidentiary question is not reviewable in a habeas proceeding because it involves issues of state, not federal. law. See 28 U.S.C. § 2254(a) (writ of habeas corpus may be granted if person "in custody in violation of the

Constitution Or laws or treaties of the United States."). An evidentiary claim is cognizable if it infringes upon a specific constitutional right. e.g., Clark v. Groose, 16 F.3d 960, 963 (8th Cir.), cert. denied, 513 U.S. 834 (1994), but no specific constitutional right is implicated by the trial court's rulings. The Constitution's guarantees of a fair trial and due process do not alter this conclusion; such a ruling would "constitutionalize" every evidentiary decision made. Petitioner's argument is not cognizable.

VV. Cumulative Error of Trial Counsel

Petitioner contends that the cumulative effect of his trial counsel's actions constitutes an independent basis for relief. The Eighth Circuit has specifically held that claims of ineffective assistance cannot be considered cumulatively; each claim of ineffective assistance of counsel must rise or fall on its own merits. E.g., Pryor, 103 F.3d at 714 n.6; United States v. Stewart, 20 F.3d 911, 917-18 (8th Cir. 1994).

WW. Cumulative Error (Generally)

In an argument related to Part IV.W, supra, Petitioner contends that the cumulative effect of all the constitutional errors entitles him to relief. The Eighth Circuit has held that "cumulative error is not grounds for federal habeas relief as each habeas claim must stand or fall on its own." McDowell v. Leapley, 984 F.2d 232, 235 (8th Cir. 1993) (quotation omitted).

V. CONCLUSION

For the foregoing reasons, Petitioner's application for a writ of habeas corpus is denied.

IT IS SO ORDERED.

DATE 12/4/98

/s/Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 97-1663-**
	)	**CV-W-3**
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER DIRECTING PARTIES TO SUBMIT SUPPLEMENTAL BRIEFING

On December 4, 1998, the undersigned denied Petitioner's application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The order observed that "the issue of procedural default predominates over the substantive claims asserted by Petitioner," slip op. at 6, and started its legal analysis by considering the four arguments Petitioner presented as grounds for overcoming the procedural bar: (a) actual innocence, (b) ineffective assistance of postconviction counsel, (c) abandonment by postconviction counsel, and (d) adequacy of state grounds. The Court concluded there was no basis for overcoming the procedural bar. The Court then considered and rejected the merits of Petitioner's non-defaulted claims.

On appeal, the Eighth Circuit held "that the state procedural rule that barred Mr. White's second amended [Rule 29.15] motion was inadequate to bar federal consideration of these claims." White v. Bowersox, No. 99-1660WM, slip op. at 2 (8th Cir. Mar. 14, 2000). The Court of Appeals also affirmed the rejection of three of Petitioner's claims on the merits. The case

was remanded "for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits." Id. at 11. The mandate was issued on April 28, 2000.

The Court of Appeals specifically refrained from considering the applicability of the "actual innocence" exception to the procedural bar. Id., slip op at 6 n.4. This appears significant because the undersigned originally observed that a number of Petitioner's defaulted claims had not been raised in the second amended Rule 29.15 motion; thus, those claims appeared to be defaulted even if the claims raised in the second amended Rule 29.15 motion could be considered (as will happen now in light of the Eighth Circuit's decision). In other words, even though claims contained in the second amended Rule 29.15 motion can now be considered, not all of the claims previously adjudged to be defaulted were contained in the second amended motion.

The Court is presently of the view that the appropriate approach on remand is to re-examine each of Petitioner's claims. If the claim was disposed of on grounds unrelated to the omission from the second amended petition, then the Court will adhere to its prior decision. Similarly, if the claim was held to be defaulted and was not included in the second amended motion, then the Court will adhere to its prior decision. If the claim was originally held to be defaulted but was included in the second amended motion, then the Court will reconsider the claim in its entirety.

This is the Court's preliminary view and is offered to guide the parties in their post-remand efforts. Before the Court makes a final determination on this matter- and before it takes up the issues to be considered on remand - the parties shall file briefs addressing the following issues:

1. Which of Petitioner's claims are to be considered on remand (and why)?

2. How should those claims be disposed of?

Petitioner shall file its suggestions on or before June 2, 2000. Respondent shall respond to those suggestions on or before June 30, 2000, and Petitioner shall have until July 21, 2000.

IT IS SO ORDERED.

DATE: 05/01/00

/s/_____

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1660WMKC

Leamon White,	*	
	*	
Appellant,	*	**Order Denying**
	*	**Petition for**
vs.	*	**Rehearing and for**
	*	**Rehearing en banc**
	*	
Michael S. Bowersox,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

April 21, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	**FILED**
	)	**JUL 23, 1991**
Respondent,	)	
	)	
vs.	)	**No. 71600**
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

The Honorable David W. Shinn, Judge

Defendant White directly appeals his jury conviction of first degree murder, three counts of armed criminal action, and two counts of first degree assault. He also moved for postconviction relief under *Rule 29.15* and now appeals from the motion court's denial of relief on procedural grounds. These two appeals were consolidated for review pursuant to *Mo. Const. 1945, Art. V, Section 3* and *Rule 29.15(l)*.

Defendant does not challenge the sufficiency of the convicting evidence, but a brief rendition of the facts follows. Defendant went with his friend Roger Buckner to the home of victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.

The purpose of defendant's visit was to obtain some "crack" cocaine. Wright had previously promised to get the cocaine and

sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

Rule 29.15 Proceedings

After his conviction defendant filed a timely but unnotarized pro se postconviction motion on August 17, 1989. The motion court appointed counsel on September 25, 1989. Movant's attorney entered his appearance and moved for a thirty day extension on October 20, 1989. On November 9, 1989 the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. This second attorney filed a "First Amended Motion" and a motion for a thirty day extension of time on November 27, 1989. The motion court then granted movant until January 9, 1990 to file a second amended motion. Movant's counsel filed the second

amended motion on January 8, 1990. On August 1, 1990 the motion court entered its findings of fact and conclusions of law denying movant relief without an evidentiary hearing.

Movant argues that this case should be remanded to the motion court for findings on the issue of postconviction counsel's abandonment in light of this Court's recent decisions in *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), and *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991). We agree.

Rule 29.15(f) provides:

> Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. . .

This Court has held that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance. *See Schneider v. State*, 787 S.W.2d 718, 720 (Mo. banc), *cert. denied* 111 S.Ct. 231 (1990) (applying the stated rule prospectively). In this case the motion court appointed counsel, and the thirty day limitation began to run, on September 25, 1989. Movant's first counsel obtained the allowed thirty day extension on October 20, 1989 and then withdrew from the case on November 9, 1989. Movant's second postconviction counsel entered his appearance on November 9, 1989, but failed to file an amended motion until November 27, 1989. *Rule 29.15(e)* specifically states:

> For good cause shown, appointed counsel may be permitted to withdraw. If appointed counsel is

> permitted to withdraw, the court shall cause new counsel to be appointed.

Neither of movant's attorneys obtained the motion court's permission for the change of counsel.[1]

The first attorney's withdrawal without permission from the motion court could constitute abandonment which arguably prejudiced movant. This issue of abandonment should be the subject of a factual inquiry by the motion court, by conducting an evidentiary hearing, or by examining the existing record if no disputed facts appear.

Movant argues that his second counsel also effectively abandoned him by failing to file a timely and complete amended motion. He argues that the amended motions were not properly verified and do not allege sufficient facts and grounds as required by *Rule 29.15(e)*. This failure to verify and properly amend the claims raises questions as to whether the defendant was essentially abandoned by his postconviction counsel. These issues should also be adjudicated in a factual hearing conducted by the motion court under the teaching of *Sanders*, 807 S.W.2d at 495.

Counsels' withdrawal, failure to file a timely amended motion, and allege sufficient facts raise serious questions as to whether the movant received postconviction representation in the sense of *Rule 29.15*. Answers to these questions are for the motion court as part of movant's *Rule 29.15* proceedings. *Sanders v. State*, 807 S.W.2d at 495.

Direct Appeal

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[1] We express no opinion as to what impact, if any, a withdrawal permitted by the motion court would have on the time limitations contained in *Rule 29.15*.

In the interest of expedition. we also address defendant's direct appeal claims and find them to be without merit.

Defendant presents five primary claims of error in his direct appeal. First, defendant alleges the trial court erred in refusing to order a new trial after the court informed the jury during voir dire that the two possible sentences for first degree murder included the death penalty or life imprisonment without probation or parole, unless the governor exercised his executive clemency powers. Defendant claims this statement "served to dilute and restrict the [jurors'] sense of responsibility," and is therefore constitutionally prohibited under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

First, it must be noted that defendant's counsel did not object to these comments at the time they were made, and our review is necessarily limited to plain error. *Rule 30.20; State v. McMillin*, 783 S.W.2d 82, 95 (Mo. banc), *cert denied* 111 S.Ct. 225 (1990). We find no plain error resulting from the trial court's correct statements of the law. The Supreme Court addressed this question in *California v. Ramos*, 463 U.S. 992 (1983), and held that an instruction allowing the jury to consider the governor's powers did not impermissibly restrict the jurors' role in sentencing. Accordingly, this court held in *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991), that no error results where the statements were correct statements of existing law. *Id.* at 9 (citing *Dugger v. Adams*, 489 U.S. 401 (1989)). The trial court's statements about punishment accurately reflect Missouri law on the possible punishments for first degree murder. *See § 565.020.1*. Defendant's first point is denied.

Defendant's second point alleges that the trial court erred by impermissibly restricting the defense counsel's cross-examination of the state's chief witness, Carol Kinney. Defense counsel confronted Ms. Kinney with prior inconsistent statements made to the police and other witnesses in an effort

to impeach her direct examination testimony. Defendant accurately points out that this Court set a liberal standard for impeachment of witnesses in *State v. Bowman*, 741 S.W.2d 10 (Mo. banc 1987), *cert. denied* 488 U.S. 829 (1988). But the use of prior inconsistent statements is not absolute. In *State v. Taylor*, 726 S.W.2d 335 (Mo. banc 1987), we held "impeachment may be made only where the witness has been asked the specific question upon which [she] is sought to be discredited." *Id.* at 337 (citations omitted). The scope of cross examination is soundly within the trial court's discretion. This contention is well-supported by Missouri cases both from this Court and the courts of appeals.[2] The trial court's decision was not an abuse of discretion. The second point is also denied.

Third, defendant claims the trial court erred in sustaining the prosecutor's challenge of venire members Robertson and Bryson for cause on account of their opinions about imposing the death penalty. Again, this matter rests within the discretion of the trial court, and we find no reason to disturb that court's ruling. This Court in *State v. McMillin*, 783 S.W.2D at 91, reiterated the proper standard for striking venire members based on their views regarding the death penalty. The record must show for each venire member struck that the "views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] oath.'" *Id.* at 91, *quoting Wainwright v. Witt*, 469 U.S. 412, 420 (1985).

Venireperson Robertson clearly stated that as a member of the jury he would be incapable of considering death as one of the possible penalties. Defense counsel made no attempt to rehabilitate this venire member, although he did object "just for the record." Similarly, Venireperson Bryson stated that she was opposed to the death penalty. Upon defense counsel's

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[2] *See, e.g., State v. Taylor*, 726 S.W.2d 335 (Mo. banc 1987); *State v. Gilmore*, 681 S.W.2d 934 (Mo. banc 1984); *State v. Laux*, 755 S.W.2d 315 (Mo. App. 1988); and *State v. Dunn*, 731 S.W.2d 297 (Mo.App. 1987).

questioning she stated that she could at least consider the death sentence, but would not vote in favor of imposing it. This Court defers to the trial judge's superior position to determine the impact of the venire member's statements and demeanor. The record supports the trial judge's conclusion that these jurors could not give appropriate consideration to the death penalty.

Defendant next argues the trial court erred by refusing defense counsel's motion for a mistrial based on statements made in the prosecutor's closing argument. The prosecutor stated:

> Because if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended -- . . .

Defendant's attorney immediately objected to this statement and requested the court to give the jury instructions to disregard the statement and follow the written instructions as given by the court. The trial court sustained the objection and gave the cautionary instruction defendant requested. Defense counsel then moved for a mistrial "to protect the record," but stated he did not want a mistrial "as a practical matter." The trial court denied the mistrial motion.

Under these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. *See State v. Laws*, 668 S.W.2D 234, 238 (Mo.App. 1984). The defendant cannot complain about the denial of a mistrial when his counsel plainly told the court that he did not want this relief.

Finally, defendant invokes this court's mandatory proportionality review under *§ 565.035, RSMo* 1986, and argues that the death sentence in this case is excessive and disproportionate when compared to similar cases. We reject

this contention and further find no indication that the sentence was imposed of passion, prejudice or any other arbitrary factor.

Disregarding those cases in which the state waived the death penalty as a possible sentence,[3] this defendant's death penalty is apparently commensurate with other similar cases in which the ultimate penalty has been imposed. We find cases similar to this one in which the jury recommended the death penalty. In *State v. Grubbs*, 724 S.W.2D 494 (Mo. banc 1987), a defendant was sentenced to death for tying up a victim, cutting his throat, and attempting to burn down the victim's trailer where the crime occurred. Similarly, in *State v. McMillin*, 783 S.W.2D 82 (Mo. banc 1990), this Court upheld a death sentence for a defendant who gagged, beat and set on fire a victim from whom the defendant had expected to obtain illegal drugs. Other cases with somewhat similar facts may not have resulted in the imposition of the death penalty, but this circumstance does not require the mitigation of this death sentence. The proper inquiry in determining proportionality is "not whether any similar case can be found in which the jury imposed a life sentence, but rather whether the death sentence is excessive or disproportionate in light of 'similar cases' as a whole. *See* § 565.035.3(3)." *State v. Mallett*, 732 S.W.2D 527, 542 (Mo. banc 1987). On the basis of prior cases, we find this defendant's sentence comports with similar cases in which other defendants received the death penalty. Defendant claims that his death sentence is disproportionate because his accomplice received a life sentence for his role in the crimes (*see State v. Buckner*, ___ S.W.2d ___ (Mo. App. 1991), but the state waived the death penalty in that case. The multiple and vicious assaults, in the course of an attempt to obtain money and drugs, demonstrate conduct of the most aggravating sort.

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[3]The Court has held that such cases are not appropriately considered for proportionality review purposes. *See State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984).

Conclusion

Defendant's conviction and death sentence are affirmed pursuant to *§ 565.035.5 RSMo* 1986. His appeal based on the denial of *Rule 29.15* relief is reversed and remanded to the motion court for further proceedings consistent with *Sanders v. State*, 807 S.W.2D 493 (Mo. banc 1991) and this opinion.

Charles B. Blackmar, Judge

Robertson, C.J., Covington, J., Kennedy, Sp.J., and Higgins, Sr.J., concur; Holstein, J., concurs in separate opinion filed; Rendlen, J., concurs and concurs in separate opinion of Holstein, J.

FILED

05-686 NOV 21 2005

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
VOL. 2 OF 3

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SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	FILED
	)	JUL 23, 1991
Respondent,	)	
	)	
vs.	)	No. 71600
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

CONCURRING OPINION

I concur fully in the Court's decision affirming the conviction. However, my concurrence with that portion of the opinion reversing the Rule 29.15 conviction is done with some reservation. I believe there is a serious question whether the appellant has properly preserved, in his point relied on, any claim that there was a violation of Rule 29.15(e). It is not a constitutional violation, but a violation of that rule which justifies a reversal under the opinions in *State v. Luleff* and *State v. Sanders*, cited and relied on in the majority opinion.

The point relied on, upon which the Rule 29.15 judgment is reversed, states as follows:

> The motion court clearly erred in denying appellant's motion for postconviction relief because the record shows that appellant was denied a full and fair hearing on all of his claims due to ineffective assistance of appointed 29.15 motion counsel, in violation of the fifth, sixth, eighth, and fourteenth amendments to the

> United States Constitution and article I, sections 10, 18(a), and 29.15 of the Missouri Constitution, in that appointed counsel failed to file a timely amended motion and failed to ascertain if all justiciable allegations of error were included in the amended motion that was filed.

It is noteworthy that no claim is made in the point relied on that counsel or the trial court failed to comply with Rule 29.15(e). In the authorities under the point, no mention is made of Rule 29.15(e). The rules are reasonably clear as to what is required in a point relied on portion of a brief:

> The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous, with citations of authorities thereunder.

Rule 84.04(d). In this particular case, the only violation asserted is a violation of a constitutional right. No claim is made that the rules of this Court were violated.

The United States Supreme Court recently reiterated that there is no constitutional right to counsel in a post-conviction proceeding, and the burden of an error made by an attorney in a collateral proceeding, including failing to meet time constraints under a state procedural rule, falls on the shoulders of the defendant. *Coleman v. Thompson*, 59 U.S.L.W. 4789.

I can think of nothing that is clearer than the language of our rule requiring the preservation of claims:

> Apart from questions of jurisdiction of the trial court over the subject matter and questions as to

> the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, allegations of error not briefed or not properly briefed *shall not be considered* in any civil appeal . . .

Rule 84.13(a) (emphasis added). The language of that rule must be given at least as much meaning and force as the languate of Rule 29.15(e).

In this case, appellant's brief was filed before the decision in *Luleff* and *Sanders*. Only in the reply brief was Rule 29.15 relied on and *Luleff* and *Sanders* were cited. Because of the peculiar circumstances of this case, I am willing to forgive the shortcomings in appellant's brief. In the future, I will not join in an opinion in which the *Sanders* claim is not properly preserved in a brief that complies with this Court's rules. To require less than compliance with our rules on briefing undermines the integrity of all the rules and leads to confusion among bench, bar and the general public. The rationale behind the rule on briefing is stated in *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978), and need not be amplified here. It is sufficient to say that requiring a party to identify the issues to be decided is not unreasonable, but is essential to our process.

The current vogue in capital cases is to transmute virtually every claim of error into a violation of some provision of the state or federal constitution. The fact is that many, if not most, rights are granted under the grace of a rule, statute or judicial precedent. The right to counsel and counsel's duties in a Rule 29.15 proceeding are guaranteed by the rule, not the Constitution. Failure to properly brief the point is, or at least should be, a waiver of the claim.

JOHN C. HOLSTEIN, Judge

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	**FILED**
	)	**MARCH 22, 1994**
Respondent,	)	
	)	**MODIFIED**
	)	**APRIL 26, 1994**
	)	
vs.	)	**No. 71600**
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY

The Honorable Alvin C. Randall, Judge

Defendant was convicted in Jackson County Circuit Court of first degree murder, armed criminal action and first degree assault. Defendant was sentenced to death. His direct appeal and motion for post-conviction relief were consolidated. This Court affirmed the appellant's direct appeal and remanded to the motion court for findings on the issue of post-conviction counsel's abandonment in light of *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). On remand, the motion court dismissed defendant's Rule 29.15 motion because it was not properly verified. In the alternative, the motion court reinstated its findings of fact and conclusions of law dated August 1, 1990, whereby the court denied defendant's motion on the merits. The motion court also reinstated its findings of fact and conclusions of law dated April 15, 1992, in which it determined that defendant was not abandoned. This Court holds that: (1) the

verification requirement for defendant's pro se 29.15 motion was met when defendant signed the motion; (2) a remand to the motion court in accordance with *Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993), is required for findings of fact and conclusions of law on defendant's pro se 29.15 motion; (3) defendant's first and second amended 29.15 motions were verified, but were not timely filed and should have been dismissed; (4) defendant was abandoned by the decision of the Office of State Public Defender to change defendant's counsel fourteen days before the end of the sixty day period for filing the Rule 29.15 amended motion without leave of court, by his first appointed counsel's withdrawal without leave of the motion court, and by both his first and second appointed counsel's failure to file an amended motion timely; (5) defendant was not abandoned by counsel for improperly verifying his amended motions or for failure to allege sufficient facts and grounds for relief; (6) defendant's first amended 29.15 motion is revived because defendant was abandoned as to the timeliness of the first amended motion but not as to the motion's content; (7) defendant's second amended 29.15 motion was properly dismissed as untimely filed; and (8) on remand the motion court should make findings of fact and conclusions of law on defendant's first amended motion in accordance with *Barry*, 850 S.W.2d 348.

FACTS

We adopt the statement of facts from our earlier opinion in *State v. White*, 813 S.W.2d 862 (Mo. banc 1991). The brief rendition of the facts in *White* are as follows.

On January 5, 1987, defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Earnest Black, a guest in the home. The purpose of defendant's visit was to obtain some "crack" cocaine. Wright had previously promised

to get the cocaine and sell it to White. When defendant and Buckner arrived, they discussed the crack deal with Wright.

During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

RULE 29.15 PROCEEDINGS

After his conviction, defendant filed a timely pro se post-conviction motion on August 17, 1989, which was not notarized. Defendant signed and placed his thumbprint on the pro se motion, stating that a notary public was unavailable. On September 25, 1989, the court appointed the Office of State Public Defender for the Sixteenth Judicial Circuit to represent the defendant on his post-conviction relief motion and granted defendant until October 23, 1989, to file an amended motion. On October 20, 1989, movant's first attorney entered his appearance and moved for a thirty day extension to file his

amended motion. The motion court granted defendant an extension until November 23, 1989; this was the only extension authorized under Rule 29.15(e).

On November 9, 1989, which was fourteen days prior to the last day the amended motion could be filed,[1] the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. On November 23, 1989, which was the filing deadline, neither of defendant's appointed counsel had filed an amended motion. On November 27, 1989, defendant's second appointed counsel filed a first amended motion and a motion for a thirty day extension of time. This first amended motion contained a handwritten verification that defendant had signed on November 14, 1989, which was prior to the drafting of the amended motion. The verification was notarized by defendant's second appointed counsel.

Although the motion court had no jurisdiction to do so under Rule 29.15(e), it granted movant's request for a second extension of time to January 9, 1990, to file another amended motion. Movant's counsel filed the second amended motion on January 8, 1990. The second amended motion also contained the handwritten verification that appellant had signed on November 14, which was prior to the drafting of either the first or second amended motions. On August 1, 1990, the motion court entered its findings of fact and conclusions of law denying

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[1]The sixty days (original thirty days plus one extension of thirty days) within which the defendant's 29.15 motion could be filed actually expired on November 24, 1989 The court, however, set the filing deadline for November 23, 1989. Thus, defendant's second appointed counsel actually could have had fifteen days under Rule 29.15(f) from the date he entered his appearance to file an amended motion. But the first amended motion was untimely filed on November 27, which was eighteen days after the second attorney entered his appearance.

movant relief without an evidentiary hearing. On appeal from the motion court's findings, this Court remanded to the motion court for a determination of whether post-conviction counsel had abandoned defendant in light of this Court's decision in *Sanders*, 807 S.W.2d 493.

On remand, the motion court found that defendant was not abandoned because his original pro se motion was not properly verified and, therefore, the court dismissed defendant's pro se motion and the first and second amended motions filed by his second attorney. The court concluded that an attorney cannot abandon something that does not exist. In the alternative, the motion court found that: (1) the first attorney's withdrawal without permission of the court did not amount to abandonment because defendant's second attorney had ample time within which to file the first amended motion (sixty days); (2) the late filing of defendant's first amended motion did not amount to abandonment because of the order allowing defendant an extension of time to file his first amended motion; and (3) defendant was not abandoned by the late filing of his second amended motion because it was filed within the extension granted by the court. Finally, in the third alternative, the motion court reinstated its findings of fact and conclusions of law dated August 1, 1990, overruling defendant's 29.15 motion in the event that this Court determines that it was not proper for the motion court to dismiss defendant's pro se motion and first and second amended motions filed by counsel.

PRO SE MOTION AND VERIFICATION

The State argues that the motion court did not have jurisdiction to rule on defendant's 29.15 pro se motion because it was not properly verified. Rule 29.15 requires: "The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not